DOCKET

No. 08-67
Vide 08-40, 08-58
Title: F. Scott Yeager, Petitioner
v.
United States
Docketed: July 16, 2008
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (06-20321)
Decision Date: March 17, 2008
Rehearing Denied: April 14, 2008
Questions Presented

---Date---	----------Proceedings and Orders----------
Jul 14 2008	Petition for a writ of certiorari filed. (Response due August 15, 2008)
Aug 8 2008	Brief amici curiae of National Association of Criminal Defense Lawyers and Criminal Law Professors filed. VIDED.
Sep 5 2008	Order extending time to file response to petition to and including September 15, 2008.
Oct 15 2008	Brief of respondent United States in opposition filed. VIDED.
Oct 24 2008	Reply of petitioner F. Scott Yeager filed.
Oct 29 2008	DISTRIBUTED for Conference of November 14, 2008.
Nov 14 2008	Petition GRANTED.
Dec 10 2008	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including January 12, 2009.
Dec 10 2008	The time within which to file respondent's brief on the merits is extended to and including February 13, 2009.
Dec 10 2008	Record received from the U.S.C.A. for the 5th Circuit.
Dec 19 2008	Record received from the U.S.D.C. for the Souther District of Texas, Houston Division.
Jan 12 2009	Joint appendix filed. (Statement of costs filed)
Jan 12 2009	Brief of petitioner F. Scott Yeager filed.
Jan 21 2009	Brief amici curiae of Texas Criminal Defense Lawyers Association, and Rex Shelby filed.
Jan 21 2009	Brief amici curiae of Criminal Law Professors filed.
Jan 21 2009	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jan 26 2009	SET FOR ARGUMENT Monday, March 23, 2009.
Jan 29 2009	CIRCULATED.
Feb 13 2009	Brief of respondent United States filed. (Distributed)
Mar 13 2009	Reply of petitioner F. Scott Yeager filed. (Distributed)
Mar 23 2009	Argued. For petitioner: Samuel J. Buffone, Washington, D.C. For respondent: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C.

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PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
FILED

08-67 JUL 14 2008

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No.

In the Supreme Court of the United States

F. SCOTT YEAGER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The courts of appeals are deeply divided as to whether, when conducting the Fifth Amendment collateral estoppel analysis set out by this court in *Ashe v. Swenson*, 397 U.S. 436 (1970), a court should consider the jury's failure to reach a verdict on some counts. The issue presented here is:

1. Whether, when a jury acquits a defendant on multiple counts but fails to reach a verdict on other counts that share a common element, and, after a complete review of the record, the court of appeals determines that the only rational basis for the acquittals is that an essential element of the hung counts was determined in the defendant's favor, collateral estoppel bars a retrial on the hung counts.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were Joseph Hirko, Rex Shelby, Petitioner F. Scott Yeager, and Respondent the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioner F. Scott Yeager respectfully seeks a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App. 1a-28a) is reported at 521 F.3d 367. The opinion of the United States District Court for the Southern District of Texas (App. 29a-66a) is reported at 446 F. Supp. 2d 719.

JURISDICTION

The judgment of the Court of Appeals was entered on March 17, 2008. A petition for rehearing en banc was denied on April 14, 2008. (App. 68a-70a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment, set out in the appendix to the petition (App. 71a), provides in pertinent part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

STATEMENT

This case is one of several criminal matters relating to the fall of the Enron Corporation. Petitioner F. Scott Yeager, along with other executives at Enron Broadband Services ("EBS"), was charged with conspiracy to engage in securities fraud and wire fraud, 18 U.S.C. § 371, wire fraud, 18 U.S.C. § 1343, securities fraud and insider trading, 15 U.S.C. §§ 78j(b) and 78ff, and money laundering, 18 U.S.C. § 1957.

After a lengthy jury trial, Yeager was acquitted of the conspiracy, securities fraud, and wire fraud charges, but the jury failed to reach a verdict on the insider trading and companion money laundering charges. Yeager moved to bar a retrial on these charges, claiming that collateral estoppel precluded relitigation of ultimate issues of fact common to the acquitted and hung counts. In affirming the district court's denial of his motion, the court of appeals held that, even though the jury could only have acquitted Yeager by determining a necessary element of the insider trading charges in his favor, the mere existence of the hung counts precluded application of collateral estoppel. In so ruling, the court of appeals rejected the majority rule adopted by other circuits that hung counts are not dispositive.

In *Ashe v. Swenson*, 397 U.S. 436 (1970), this Court confirmed that the principles of collateral estoppel embodied in the Double Jeopardy Clause form an important part of the constitutional protections afforded to criminal defendants. Here, the jury acquitted Yeager of multiple fraud counts, and, as the court of appeals recognized, the only rational interpretation of those acquittals was that

Yeager did not possess insider information that contradicted what was presented to the public. Nevertheless, the court of appeals refused to apply collateral estoppel to prevent the government from retrying Yeager for the very same conduct. App. 22a. The sole basis for its refusal to preclude Yeager's retrial was that "when we consider the hung counts along with the acquittals, we are faced with a potential inconsistency, making it impossible for us to decide with any certainty what the jury necessarily determined." App. 22a. The court of appeals went on to hold that the presumed uncertainty created by the hung counts "preclude[d]" Yeager from establishing that the jury necessarily decided a common element of the acquitted and hung counts. App. 27a. The court of appeals acknowledged that, by considering the presence of hung counts when evaluating the collateral estoppel consequences of the acquitted counts, it was "parting ways with" the majority of other circuits to have considered the question. App. 27a. Those courts refuse to consider the uncertainty created by hung counts as part of their *Ashe* analysis.

The practical effect of this holding is to render the protections of collateral estoppel entirely unavailable where a jury acquits a defendant on some counts but fails to resolve others that have a common element. That is because in all but the (exceedingly rare) situation where the substance of a jury's deliberations is made known, a defendant will never be able to demonstrate why the jury necessarily determined a particular element in his favor when acquitting him on some counts but failing to render a verdict on related counts.

A. Proceedings at Trial.

The government's theory of prosecution was that Yeager, along with others, planned and carried out a scheme to defraud investors in Enron stock by purposely making a series of misrepresentations and material omissions about the capabilities and performance of EBS and its products and services. The alleged object of the scheme was to inflate the price of Enron stock by linking it with promising developments at EBS. As the culmination of this scheme, Yeager and others were alleged to have sold large amounts of Enron stock while in possession of information about the true state of EBS. These stock sales were charged as insider trading. This scheme to defraud was expressly incorporated into all of the charges against Yeager.[1]

At trial, the government focused on whether statements to stock analysts and in press releases were false or omitted truthful information. Yeager testified that he did not make or cause false statements or material omissions at the presentations to analysts or in the press releases, and that in fact he barely spoke at the analyst presentation and had no role in the issuance of the press releases. His defense was that he could not have participated in defrauding investors by failing

[1] Yeager was charged with one count of conspiracy to commit wire fraud and securities fraud, one count of securities fraud based on misrepresentations and omissions at a January 2000 Enron conference for securities analysts, four counts of wire fraud based on misrepresentations in EBS press releases, 20 counts of insider trading and 99 counts of money laundering. Each count incorporated the scheme to defraud allegations contained in paragraphs 1-33 of the Fifth Superseding Indictment.

to disclose adverse information about EBS when he believed in good faith that the problems did not exist or were being cured. Yeager flatly denied that the alleged problems at EBS played any role in the sale of his Enron stock.[2] Yeager's testimony that he had a good-faith, reasonably held belief in the functionality and prospects for the EBS network and products he helped develop was affirmed by several government witnesses.[3]

After a thirteen-week trial, the jury acquitted Yeager on all of the conspiracy, securities fraud, and wire fraud counts. The jury failed to reach a verdict on charges that Yeager, as the culmination of the scheme to defraud, engaged in insider trading and money laundering by conducting monetary transactions with the proceeds of the wire fraud and insider trading.

The government then issued an Eighth Superseding Indictment charging Yeager with some of the same insider trading and money laundering offenses. Yeager moved to dismiss those charges on the ground that they were barred by collateral estoppel. Specifically, Yeager argued that when the jury acquitted him of conspiracy, securities fraud, and wire fraud, it necessarily determined an essential element of the insider trading charges, and that those charges were therefore barred by collateral estoppel. Yeager argued in the alternative that if the insider trading charges were not completely barred, evidence relating to the acquitted conduct could not be introduced against him at a future trial. The district court denied Yeager's

[2] Trial Tr. 10175, June 22, 2005.

[3] *See, e.g., id.* at 9920-21.

motion, finding that the insider trading and money laundering charges were not barred by collateral estoppel.[4]

B. Proceedings in the Court of Appeals.

Yeager appealed, and on March 17, 2008, a panel of the United States Court of Appeals for the Fifth Circuit affirmed, concluding that the insider trading and money laundering charges were not barred by collateral estoppel. The Fifth Circuit conducted the *de novo* review of the record required by *Ashe* to determine the basis for the jury's acquittals. After a thorough review of the indictment, jury charge, trial evidence, and arguments of counsel to the jury, the court of appeals concluded that the "jury must have found when it acquitted Yeager that Yeager himself did not have any inside information that contradicted what was presented to the public." App. 21a. The court specifically acknowledged that "when we consider the acquittals by themselves, it appears that Yeager is correct that collateral estoppel bars a retrial." App. 21a-22a. But notwithstanding that finding, the court ruled that Yeager's prosecution for insider trading and money laundering could proceed on the sole ground that the hung counts made it impossible to determine what the jury decided when it acquitted

[4] The district court also placed limits on the evidence that could be introduced against Yeager at a future trial but ruled that the prosecution could effectively rely on the exact evidence it presented on the acquitted counts in any retrial. App. 61a. Only the district court's ruling that the counts were not entirely barred was immediately appealable, and it is that ruling that is at issue here. *See Abney v. United States*, 431 U.S. 651, 657-62 (1977).

Yeager of the other fraud-based charges in the indictment. App. 22a.

The court of appeals concluded that it must consider the hung counts in addition to the acquittals, and that the presence of the hung counts created a "potential inconsistency, making it impossible for us to decide with any certainty what the jury necessarily determined." App. 22a. The court therefore held, despite its finding that the rest of the trial record compelled the conclusion that Yeager did not posses insider information that contradicted what was disclosed to the public, that the presence of the hung counts alone meant that "we cannot apply collateral estoppel in this case." App. 22a.

More particularly, the court of appeals held that the jury acquitted Yeager of securities fraud[5] either because there were no material misrepresentations or omissions made at the 2000 Enron Analysts Conference or because "Yeager did not knowingly make misrepresentations and omissions because he believed the presentations were truthful." App. 20a. Under either rationale, the court concluded, "the jury must have found when it acquitted Yeager that Yeager himself did not have any insider information that contradicted what was presented to the public." App. 21a.

Nevertheless, the court of appeals speculated that if the jury had acted "rationally [it] would also have acquitted Yeager of the insider trading counts."

[5] The court of appeals limited its collateral estoppel analysis to the securities fraud count based on its finding that Yeager did not possess insider information, and accordingly it was unnecessary for it to determine if the jury reached the same conclusion in acquitting Yeager of the other counts. App. 18a.

App. 22a. Based on this presumption of the sole way that a "rational" jury could have reached a verdict, the court of appeals held that, when the hung counts were considered, the court was "faced with a potential inconsistency, making it impossible for us to decide with any certainty what the jury necessarily determined." App. 22a. Given its presumption that a split verdict was an irrational verdict, it concluded that "[w]hether we can weigh hung counts in applying collateral estoppel then is critical to our analysis." App. 22a. The end result was that if only the acquittals, not the hung counts, were considered, "collateral estoppel bars a retrial." App. 22a.

The court of appeals concluded that its prior decisions required consideration of hung counts. App. 23a (citing *United States v. Larkin*, 605 F.2d 1360 (5th Cir. 1979), *withdrawn in part on other grounds*, 611 F.2d 585 (5th Cir. 1980)). It further acknowledged that its holding required it to "part ways with" several other circuits, which have held that the presence of hung counts is legally irrelevant to the collateral estoppel analysis. App. 27a.

The court of appeals then set about attempting to explain the "discrepancy" created by the presumed irrationality of the partial verdict and offered several guesses why the jury may have acted as it did. It first speculated that "the jury was irrational." App. 24a. Another possibility, the court supposed, was that the split verdict simply occurred for some unknown reason. Finally, it posited that the jury might not have even reached the hung counts in its deliberations. It therefore concluded that, because it could not choose between these options with any certainty, "Yeager failed to carry his burden and establish what the jury necessarily

decided." App. 25a.[6]

On April 14, 2008, Yeager's request for a rehearing en banc was denied by the court of appeals. App. 69a.

REASONS FOR GRANTING THE PETITION

This petition presents a question of law upon which the circuits are starkly divided: whether a jury's failure to reach a verdict on one or more counts must be considered when examining the collateral estoppel consequences of the jury's verdict of acquittal on other counts. The court of appeals' willingness to presume that a jury acts irrationally when it reaches a verdict on some counts and fails to reach a verdict on related counts imposes an impossible burden that renders the protections of collateral estoppel unavailable to all who face this situation. This Court's review is necessary to resolve this clear conflict and to restore the collateral estoppel protections afforded to defendants when juries return partial verdicts.

A. The Doctrine of Collateral Estoppel and the *Ashe v. Swenson* Analysis.

[6] The court did, however, reject the government's argument that this Court's decision in *United States v. Powell*, 469 U.S. 57 (1984) precluded application of collateral estoppel whenever a jury acquits a defendant on some counts but fails to reach a verdict on related counts. In doing so, it quoted from *Powell* that this Court's holding was "predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict." App. 26a (quoting *Powell*, 469 U.S. at 68). The court of appeals chose to follow its sister circuits that had rejected this same argument.

Collateral estoppel following a criminal acquittal is guaranteed by the Double Jeopardy Clause of the Fifth Amendment of the Constitution. *Ashe*, 397 U.S. at 445. Though "[c]ollateral estoppel is an awkward phrase . . . it stands for an extremely important principle in our adversary system of justice." *Id.* at 443. The doctrine ensures that "when an issue of ultimate fact has once been determined by a valid and final judgment, the issue cannot again be litigated between the same parties in any future lawsuit." *Id.* The doctrine was first developed in civil litigation, but it was a fixed principle of federal criminal law for many years even before the landmark *Ashe* decision. *See, e.g., United States v. Oppenheimer*, 242 U.S. 85, 88 (1916) (holding that where a criminal charge has been adjudicated it "may be pleaded to bar any subsequent prosecution").

The collateral estoppel principles embodied in the Double Jeopardy Clause serve an important role in protecting a defendant against being reprosecuted for an issue of ultimate fact of which he has been acquitted. In such situations, a defendant should not have to run the gauntlet a second time or be subjected to the "hazards of trial and possible conviction more than once." *Ashe*, 397 U.S. at 447 (Black, J., concurring). Collateral estoppel protects the defendant from being "forced to live in a continuous state of anxiety and insecurity" concerning the particular issues that have already been tried, and it prevents the government from repeated attempts to subject him to "embarrassment, expense and ordeal." *Green v. United States*, 355 U.S. 184, 187 (1957).

The defendant bears the burden of demonstrating that the issue to be estopped was necessarily decided in the first trial. *Dowling v. United States*, 493 U.S. 342, 350 (1990). To test a defendant's claim, the court must "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444. This inquiry must be "set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Sealfon v. United States*, 332 U.S. 575, 579 (1948). As the Court observed in *Ashe*, any test "more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings." *Ashe*, 397 U.S. at 444.

Here, Yeager successfully defended himself in a lengthy trial, and a jury determined that he was not guilty on multiple counts. The court of appeals recognized that the only way the jury could have reached these determinations was by accepting his defense that his good faith belief in the truthfulness of information about EBS conveyed to the public precluded a finding that he possessed insider information to the contrary. Despite this finding, Yeager will be forced to face a second jury, which will be presented with the same evidence in an effort to convince the jurors that they should make a finding contrary to the only reasonable interpretation of the acquittals by the first jury. He thus will be forced to run the gauntlet a second time, due solely to the judicially imposed presumption that

a rational jury would also have acquitted him of the hung counts.

B. The Courts of Appeals Disagree Whether Collateral Estoppel Applies When a Jury Fails to Reach a Verdict on Some Counts and Acquits a Defendant on Others.

The courts of appeals are divided as to whether collateral estoppel ever applies when a jury acquits on some counts but fails to reach a verdict on other counts. A majority of courts has held that it is improper to consider hung counts and refuses to impute any meaning to a jury's failure to reach a verdict. In the decision below, the Fifth Circuit expressly "part[ed] ways with" those courts, instead adopting the contrary rule followed by a minority of circuits. App. 27a.

1. *A Majority of the Courts of Appeals Facing This Issue Have Found that Hung Counts Do Not Prevent the Application of Collateral Estoppel.*

The Courts of Appeals for the Sixth, Seventh, Ninth, and Eleventh Circuits agree that the failure of a jury to reach agreement on some counts cannot deprive an acquittal of collateral estoppel consequences, because the presence of hung counts should not be weighed as part of the *Ashe* analysis. *See United States* v. *Ohayon*, 483 F.3d 1281 (11th Cir. 2007); *United States v. Romeo*, 114 F.3d 141, 144 (9th Cir. 1997); *United States* v. *Bailin*, 977 F.2d 270, 276 (7th Cir. 1992); *United States v. Frazier*,

880 F.2d 878, 885-86 (6th Cir. 1989). The Second Circuit has similarly held that hung counts do not create an inconsistency that prevents the application of collateral estoppel. *United States* v. *Mespoulede*, 597 F.2d 329, 336-37 (2d Cir. 1979).[7]

These courts agree that the *Ashe* collateral estoppel analysis must focus on the counts on which the jury actually reached a verdict, because consideration of why the jury failed to reach a verdict on other counts requires speculation inconsistent with the practical analysis mandated by *Ashe*. The inconclusiveness inherent in a hung count makes it impossible to find an inconsistency between an acquittal and a hung count, and therefore, "when a jury acquits on some counts in a multicount indictment, principles of collateral estoppel may preclude retrial of charges upon which the jury was unable to agree at the earlier trial." *Frazier*, 880 F.2d at 883. *See also Mespoulede*, 597 F.2d at 336-37.

[7] The Court of Appeals of Maryland follows the majority rule as well. *See Ferrell v. State*, 567 A.2d 937, 944 (Md. 1990) ("There is no question that those verdicts [of acquittal] do constitute a valid determination of issues of ultimate fact. Because the jury's failure to agree [on other counts] did not decide any facts, it did not make the validity of that determination questionable."). The Fourth and Eighth Circuits have not specifically addressed whether the presence of hung counts bars collateral estoppel, but have conducted an *Ashe* analysis even when the jury hung on some counts, implying that the mere presence of hung counts does not prevent the application of collateral estoppel. *See United States v. Goodine*, 400 F.3d 202, 209-10 (4th Cir. 2005); *United States v. Bearden*, 265 F.3d 732, 735-36 (8th Cir. 2001). The Third, Tenth, and Federal Circuits have not had occasion to apply collateral estoppel to partial verdicts.

In *Romeo*, the Ninth Circuit held that "[b]ecause there are so many variable factors which can cause a jury not to reach a verdict," a court should not "speculate on why the jury could not agree. The inquiry under *Ashe* is what the jury actually decided when it reached its verdict, not on why the jury could not agree on the deadlocked count." 114 F.3d at 144. Reaching the same conclusion, the Seventh Circuit held in *Bailin* that

> [t]he government cannot prevail with the . . . argument that an acquittal on one count, coupled with a hung jury on a related count, makes it impossible to determine that the jury necessarily established any common element of those two offenses against the government. . . . [T]he jury's failure to reach a verdict is too inconclusive to qualify as inconsistent for the purposes of issue preclusion. The powerful double jeopardy protections that attach to acquitted counts should not be outweighed by the inconclusiveness inherent in hung counts.

977 F.2d at 279-80. Most recently, in *Ohayon*, the Eleventh Circuit considered whether collateral estoppel applied in a case where the jury acquitted on some counts but hung on others.[8] The defendant

[8] The *Ohayon* court, like the Fifth Circuit in this case, was bound to follow the Fifth Circuit's decision (decided before the Eleventh Circuit's creation) in *United States v. Larkin*, 605 F.2d 1360 (5th Cir. 1979), *withdrawn in part on other grounds*, 611 F.2d 585 (5th Cir. 1980). That the Fifth and Eleventh Circuits reached different answers to the same question while following the same precedent further illustrates the confusion in the appellate courts and the need for guidance from this Court.

in *Ohayon* was acquitted of attempting to possess drugs with the intent to distribute, but the jury hung on a charge of conspiracy to possess with intent to distribute. 483 F.3d at 1282. The court found that the sole disputed fact at trial was whether Ohayon knew that certain duffle bags contained drugs. *Id.* at 1283. After reviewing the record, the court concluded that "a rational jury could not have acquitted Ohayon on a ground other than his ignorance of the contents of the bags." *Id.* at 1287. The court rejected the notion that the jury's verdicts could have resulted from juror error, "[b]ecause we ask what a rational jury would have done." *Id.* at 1288. Similarly, the Eleventh Circuit refused to consider whether the jury had simply nullified by refusing to convict on the conspiracy count because, "[w]hile the possibility of jury nullification may influence the strategy of trial lawyers, it cannot enter into the analysis of courts making collateral estoppel inquiries." *Id.*[9]

The Eleventh Circuit also rejected the government's argument "that we should search for the basis of a mistried count," holding "that the search for the basis of a mistried count *will necessarily be in vain*." *Id.* at 1289 (emphasis added). The court added, "[i]n truth, the failure of a jury to reach a verdict is not a decision; it is a failure to reach a decision. A partial verdict does not comprise two decisions that we must try to reconcile, because the mistried count is not a decision for which we can discern, or to which we can impute, a

[9] Here, the Fifth Circuit took exactly the opposite approach, finding that one of the possible grounds for the jury's failure to reach a verdict on the hung counts was that the jury acted irrationally.

single, rational basis." *Id.* at 1289-90.[10]

The decisions in the Sixth, Seventh, Ninth, and Eleventh Circuits held that a jury's failure to reach a verdict on related counts did not prevent an analysis of the collateral estoppel effect of the acquitted counts on the hung counts. Under this rule, Yeager could not be retried on the insider trading and money laundering counts on which the jury hung, because (as the Fifth Circuit here acknowledged), in acquitting Yeager on the conspiracy, wire fraud, and securities fraud counts of the indictment, the jury necessarily found that the government failed to prove an essential element common to the acquitted and hung counts.[11] Since possession and use of that inside information is an essential element of the remaining insider trading charges, his retrial on those charges would be barred under the majority rule.

2. *The First, Fifth, and District of Columbia Circuits Have Held That Collateral Estoppel Does Not Apply to Hung Counts.*

Along with the Fifth Circuit in this case, the District of Columbia Circuit and the First Circuit have held that hung counts are relevant to and alone can preclude collateral estoppel. In *United States v. White*, 936 F.2d 1326 (D.C. Cir. 1991), the defendant was charged with possessing an

[10] But here, the Fifth Circuit attempted precisely this type of search for a rational basis for the hung counts and, unable to find one, merely passed this impossible task on to Yeager.

[11] That is, it found that the jury necessarily decided that fact in Yeager's favor, *but for* the presence of the hung counts.

unlawfully issued birth certificate with the intent to defraud the United States, in violation of 18 U.S.C. § 1028(a)(4), as well as making false statements in an application for a United States passport, in violation of 18 U.S.C. § 1542. 936 F.2d at 1327. The government's theory was that White committed his crimes in the course of assisting another man, Harold Linden, in obtaining a U.S. passport under the name "William Baldwin." *Id.* Since White admitted that he had committed the alleged acts, the sole issue at trial was White's mens rea. *Id.* at 1328-29. The jury acquitted White on the birth certificate count, but hung on the false statements charge. *Id.* at 1327.

When the government attempted to retry White on the false statements charge, White argued that his reprosecution on the hung count was barred by collateral estoppel, because the jury had conclusively determined that he believed that the papers at issue were not false. *Id.* at 1329.

The D.C. Circuit rejected White's argument, holding that if "the jury [had] found, as the appellant contends, that he actually believed Linden to be William Baldwin, it would have acquitted him on the second count as well as the first." *Id.* The court found that accepting White's collateral estoppel argument "would require us to assume that the jury acted inconsistently, reaching opposite findings on the same issue in the different counts," citing this Court's holding in *Powell*, 469 U.S. at 68. *White*, 936 F.2d at 1329. Shortly after the decision in *White*, the First Circuit reached the same conclusion, in a decision citing both *White* and *Powell*. *See United States v. Aguilar-Aranceta*, 957 F.2d 18, 24-25 (1st Cir. 1992).

In *Powell*, a jury acquitted the defendant of conspiracy to possess and possession of cocaine, but convicted her of using the telephone in "committing and in causing" the conspiracy and possession. 469 U.S. at 60. These verdicts were inconsistent because Powell could not have used the telephone to commit offenses she did not commit. But the Court held that the inconsistent verdicts were not grounds to overturn the convictions on the telephone charges, because an inconsistent verdict may be the result of lenity or compromise rather than error. *Id.* at 65-67. To assess the reason for the inconsistency, the Court opined, "would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake." *Id.* at 66.

In extending *Powell* to find that an inconsistency between an acquittal and a hung count prevents the application of collateral estoppel, *White* and *Aguilar-Aranceta* reached a holding directly contrary to those of other courts of appeals on the same issue. *See, e.g., Ohayon*, 483 F.3d at 1289-90 ("In truth, the failure of a jury to reach a verdict is not a decision; it is a failure to reach a decision. A partial verdict does not comprise two decisions that we must try to reconcile, because the mistried count is not a decision for which we can discern, or to which we can impute, a single, rational basis."); *Bailin*, 977 F.2d at 279-80 ("[T]he jury's failure to reach a verdict is too inconclusive to qualify as inconsistent for the purposes of issue preclusion."); *Frazier*, 880 F.2d at 883 ("We do not believe that *Powell* supports the government's argument that collateral estoppel may never be applied to prevent retrial of charges on which the first jury fails to agree.").

While the Fifth Circuit also held that collateral estoppel does not bar retrial on hung counts, it disagreed with the government's argument for an extension of *Powell*.[12] App. 26a-27a. But given its admitted inability to determine why the jury hung, the court's requirement that a defendant eliminate any uncertainty caused by the hung counts effectively adopted the very *Powell* argument that it claimed to reject.

The correct rule in these circumstances, and the only one that can preserve *Ashe's* protections, is that courts must search for the rationality of a jury's verdict based on what the jury actually found i.e., verdicts and not default to a presumption that it may have acted irrationally in *failing* to reach a verdict on related counts. The Eleventh Circuit articulated this rule in *Ohayon* when it rejected the Government's argument "that we should search for the basis of a mistried count," holding "that the search for the basis of a mistried count will necessarily be in vain," and refused to consider whether the jury had simply nullified because "[w]hile the possibility of jury nullification may influence the strategy of trial lawyers, it cannot

[12] The Fifth Circuit stated that, "[i]n the cases before our sister circuits, the government has argued, as it does here, for an extension of *Powell*. The government maintains that *Powell* precludes applying collateral estoppel in cases where the jury acquitted defendants on some counts but hung on related counts because this result is also inconsistent. The Sixth, Seventh, Ninth, and Eleventh Circuits rejected this argument because they found that acquittals are not inconsistent with mistried counts. As the Sixth Circuit noted, '[n]o such inconsistency is necessarily present' because '[b]oth the acquittal and the failure to agree could result from a number of factors.'" App. 26a (internal citations omitted).

enter into the analysis of courts making collateral estoppel inquiries." 483 F.3d at 1289.

By entertaining the possibility that the jury was acting irrationally or "for some unknown reason," thereby ignoring *Ashe's* mandate that the jury must be presumed to be rational, *see* 397 U.S. at 444, the Fifth Circuit effectively threw up its hands at the hung counts and concluded that the jury's acquittals decided nothing, even though this meant ignoring its own determination that the only way a rational jury could have acquitted Yeager of securities fraud was by determining that he did not possess any insider information.

Except in the extremely rare instance when a jury's reasons for deadlocking are known and made part of the record, a defendant is prevented from establishing the basis for the jury's failure to reach a verdict.[13] Here, the Fifth Circuit postulated several possible bases for the jury's inability to reach complete verdicts, but its list was by no means complete. App. 24a-25a. Once the door to speculation is opened to possible reasons the jury failed to reach a verdict, other even more likely possibilities emerge, including the jury's inability to reach unanimity in the face of an *Allen* charge, prosecutorial overcharging in the indictment (which included 119 insider trading and money laundering counts against Yeager), and an abrupt termination of deliberations by the district court.[14] Equally

[13] For example, Yeager sought leave to interview the jurors after trial, but that request was opposed by the government and denied by the district court. App. 67a.

[14] On the fourth day of deliberations, the jurors informed the district court that they had reached a verdict on some counts but were deadlocked on others. Trial Tr. 13711, July 19, 2005.

important, these explanations of the hung counts do not cast doubt on the court of appeals' initial determination that the jury necessarily concluded that Yeager did not possess material, nonpublic information when acquitting him of numerous fraud counts.

For purposes of collateral estoppel analysis, the Fifth Circuit treated the hung counts as if they were determinations of fact contrary to the acquittals. Although the court of appeals purported to claim that "the presence of mistried counts *diminishes* the likelihood that, in acquitting defendants on related counts, the jury made a factual determination that bars a retrial," App. 23a (emphasis added), its later reasoning demonstrated that, far from diminishing the likelihood, it *precluded* it.

If it is "impossible to discern definitively why a jury hung," no defendant could ever "show that the jury necessarily determined that he did not have insider information." App. 28a. The Fifth Circuit, however, would have it both ways. It contends that it is impossible to discern why the jury hung, but it would require that defendants do precisely that to apply collateral estoppel. The impossible burden the Fifth Circuit placed on defendants is inconsistent with the Fifth Amendment's protection against double jeopardy and this Court's opinion in *Ashe*.

At 3:50 p.m., the district judge gave an unusual *Allen* charge, instructing the jury to take until 5 p.m. to determine whether additional deliberations could help it reach a verdict on the deadlock counts. *Id.* at 13724. At 5 p.m., when the jury again indicated that it was deadlocked on some counts, the district judge accepted its partial verdict rather than insisting on further deliberations. *Id.* at 13725.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 14, 2008

APPENDIX A

521 F.3D 367

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

06-20321

UNITED STATES OF AMERICA
Plaintiff - Appellee
v.
SCOTT YEAGER
Defendant - Appellant

Consolidated with
06-20593

UNITED STATES OF AMERICA
Plaintiff - Appellee
v.
REX SHELBY
Defendant - Appellant

Consolidated with
06-20691

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

JOSEPH HIRKO
Defendant - Appellant

No. 06-20321

Appeals from the United States District Court for the Southern District of Texas

March 17, 2008

Before: HIGGINBOTHAM, GARZA, and BENAVIDES, Circuit Judges. FORTUNATO P. BENAVIDES, Circuit Judge:

This is a consolidated interlocutory appeal of an order denying a motion to dismiss a government indictment under the doctrine of collateral estoppel.[1] In 2005, Defendants F. Scott Yeager, Joseph Hirko, and Rex Shelby ("Defendants") were tried on various counts for their actions while employed at Enron Broadband Services ("EBS"). The jury acquitted

[1] We have jurisdiction over this case under 28 U.S.C. § 1291. *Abney v. United States*, 431 U.S. 651, 659 (1977) ("Although it is true that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds lacks the finality traditionally considered indispensable to appellate review, we conclude that such orders fall within the small class of cases that Cohen [sic] placed beyond the confines of the final-judgment rule.") (internal quotation marks omitted).

Defendants on some of these counts but hung on others, after which the United States ("Government") again indicted Defendants on some of the mistried counts. Contending that the acquitted counts collaterally estopped the Government from pursuing the mistried counts, Defendants moved to dismiss the indictment. The district court denied the motion. For the reasons below, we AFFIRM.

I.

This case arises from the collapse of Enron Corporation ("Enron") and its subsidiaries. Defendants were senior executives at EBS, Enron's broadband and telecommunications unit. In November 2004, Defendants were indicted on various counts of: (1) conspiracy to commit securities and wire fraud, (2) securities fraud, (3) wire fraud, (4) insider trading, and (5) money laundering.[2]

In 1998, Enron began developing an "intelligent" telecommunications network and associated software. The indictment alleged that Defendants purposely sought to deceive the public by making false statements about EBS's progress and financial condition. According to the indictment, Defendants made false claims in various press

[2] Defendants Yeager, Hirko, and Shelby were all charged with one count of conspiracy to commit securities and wire fraud, 18 U.S.C. § 371, one count of securities fraud, 15 U.S.C. §§ 78j(b) and 78ff, and four counts of wire fraud, 18 U.S.C. § 1343. In addition, Yeager was charged with 20 counts of insider trading and 99 counts of money laundering. Shelby was charged with eight counts of insider trading and six counts of money laundering. Hirko was charged with 7 counts of insider trading and 14 counts of money laundering.

releases beginning in 1999 and at Enron's annual analyst conference in January 2000. The indictment also charged Defendants with selling millions of dollars of Enron stock while making these false statements.

In July 2005, the jury acquitted Defendants on some counts but could not reach a verdict on others. Yeager was acquitted of the conspiracy, wire fraud, and security fraud counts. Hirko was acquitted of some of the insider trading and money laundering counts; and Shelby was acquitted of some of the insider trading counts. Because the jury hung on the remaining counts, the district court declared a mistrial on those counts. The district court also granted Shelby's Rule 29 motion for judgment of acquittal on the money laundering counts and the wire fraud counts.[3]

In November 2005, the Government obtained new indictments against Defendants. These post-trial indictments recharged Shelby and Hirko with all of the mistried counts and recharged Yeager with some of the mistried insider trading and money laundering counts. The indictments recharged Yeager with five counts of insider trading and eight counts of money laundering; Hirko with one count of conspiracy, one count of securities fraud, and five counts of insider trading; and Shelby with one conspiracy count, one securities fraud count, and four counts of insider trading. Shelby and Hirko moved to dismiss all of the recharged counts, except

[3] Rule 29 of the Federal Rules of Criminal Procedure states in relevant part: "If the jury has failed to return a verdict, the court may enter a judgment of acquittal." Fed. R. Crim. P. 29(c)(2).

for the conspiracy counts against Hirko and Shelby and the 2001 insider trading counts against Hirko. Yeager moved to dismiss all of the mistried insider trading and money laundering counts.[4] Defendants contend that their previous acquittals collaterally estopped the Government from pursuing these charges. The district court denied their motion.

II.

Whether collateral estoppel bars a subsequent criminal prosecution is a question of law that we review *de novo*. *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997).

III.

The Fifth Amendment's guarantee against double jeopardy incorporates the collateral estoppel doctrine. *Ashe v. Swenson*, 397 U.S. 436, 443-44 (1970). Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. As traditionally understood, the Double Jeopardy Clause precludes

[4] In addition to the recharged counts, Yeager moved to dismiss the mistried counts in the indictment the Government secured before the trial ("the old indictment") but not in the November 2005 indictment ("the new indictment"). The Government maintains that it can prosecute Yeager under both the new and old indictments and, therefore, can retry him on all of the insider trading and money laundering counts. Therefore, Yeager moved to dismiss both indictments, contending that collateral estoppel precludes the Government from retrying him on any of the mistried counts. Because the Government does not dispute Yeager's contention that the collateral estoppel analysis is the same for all of the mistried counts, we do not differentiate between the two indictments here.

multiple prosecutions and multiple punishments for the same offense. *See United States v. Odutayo,* 406 F.3d 386, 392 (5th Cir. 2005). *Ashe*, however, limits successive prosecution of defendants, not for the same offenses but for different offenses.[5] After an acquittal, *Ashe* bars the government from prosecuting defendants on a different charge "if one of the facts *necessarily determined* in the former trial is an essential element of the subsequent prosecution." *Brackett*, 113 F.3d at 1398. Defendants asserting collateral estoppel carry the burden to make this showing. *Dowling v. United States*, 493 U.S. 342, 350 (1990) ("The Court of Appeals have unanimously placed the burden on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding.").

To determine whether collateral estoppel bars a subsequent criminal prosecution, courts must conduct a two-step analysis. *Bolden v. Warden, W. Tenn. High Sec. Facility*, 194 F.3d 579, 584 (5th Cir. 1999). "Initially, we must decide which facts

[5] In *Ashe*, masked gunmen robbed a group of men playing poker at a residence. *Ashe*, 397 U.S. at 437. The government alleged that the defendant was one of the gunmen and charged the defendant with the armed robbery of one of the players. *Id.* at 438. Neither party disputed the facts that an armed robbery had occurred and that the gunmen had taken the victim's property. *Id.* The only dispute was whether the defendant was one of the robbers. *See id.* After the jury acquitted the defendant for lack of sufficient evidence, the government prosecuted him for robbing one of the other poker players. *Id.* at 439. According to the Court, "the jury by its verdict found that he had not [been one of the robbers]," and, under the doctrine of collateral estoppel, the second prosecution was impermissible. *Id.* at 445.

necessarily were decided in the first proceeding. Then we must consider whether the facts necessarily decided in the first trial constitute essential elements of the offense in the second trial." *Id.* Here, Defendants assert collateral estoppel bars the Government from pursuing all of the current charges against them, except for the conspiracy counts against Hirko and Shelby and the 2001 insider trading counts against Hirko.[6] We engage in this two-step analysis as to each defendant's claims below.[7]

A. Rex Shelby

Shelby was acquitted of the four insider trading counts related to his sale of Enron stock in the summer of 2000 ("Summer 2000 Insider Trading Counts"). The jury hung on the conspiracy to commit securities and wire fraud count, the securities fraud count, the four wire fraud counts, the four insider trading counts related to trades he conducted between January and March 2000 ("Early 2000 Insider Trading Counts"), and all the money

[6] For convenience purposes, we will refer to all of the counts that Defendants seek to dismiss as the "mistried counts" from this point onward. We recognize that the jury also hung on the conspiracy counts against Defendants Hirko and Shelby and the 2001 insider trading counts against Hirko. But because Defendants Hirko and Shelby do not seek their dismissal, these counts are not at issue here and are, therefore, omitted from our discussion.

[7] While Defendants all argue that collateral estoppel bars a retrial, the specifics of each defendant's argument are different. In this case, each defendant was acquitted of different counts and now seeks to dismiss different counts. Therefore, we must analyze each defendant's collateral estoppel argument separately.

laundering counts. After the jury rendered its verdict, the district court granted Shelby's Rule 29 motion for judgment of acquittal on the money laundering counts and the wire fraud counts. Shelby now contends that, under collateral estoppel, these acquittals preclude the Government from retrying him on the securities fraud count and the Early 2000 Insider Trading Counts. This argument is unpersuasive.[8]

1. Jury Acquittals

Based on his review of the record, Shelby claims that the jury necessarily came to one of three potential conclusions when it acquitted him of the Summer 2000 Insider Trading Counts: (1) he did not withhold material information from the public, (2) there was no scheme to defraud, or (3) he lacked the intent to defraud. Because any one of these findings would bar the Government from prosecuting him on the securities fraud count and the Early 2000 Insider Trading Counts, Shelby seeks dismissal of these counts.

After an extensive examination of the record, we conclude that the jury could have acquitted Shelby of the Summer 2000 Insider Trading Counts on another basis: it determined that he did not "use"

[8] Shelby does not contend that collateral estoppel applies to the conspiracy to commit securities and wire fraud count. Shelby argues, however, that, if we decided that collateral estoppel precludes the Government from retrying him on the securities fraud and the Early 2000 Insider Trading Counts, then collateral estoppel also would bar the Government from introducing some evidence in a retrial of the conspiracy count. Because we find that collateral estoppel does not bar a retrial of any of the mistried counts, we do not address this issue here.

undisclosed, material information when he made the sales. Shelby testified that he sold shares of his Enron stock in 2000 because he was uncomfortable with being in the stock market and that he relied on his friend David Berberian's advice as to when to sell. Moreover, in the summer of 2000, Shelby immediately exercised options that vested and promptly sold the shares that he received. Because Shelby sold those shares as soon as possible, the jury could have concluded that Shelby conducted the summer 2000 trades due to his discomfort with the stock market.[9]

Shelby argues that the jury could not have acquitted him on this basis because the jury instructions did not explain the relevance of "using" insider information to insider trading. According to Shelby, the elements of insider trading do not include the word "uses," and the district court's explanation of the word "uses" does not immediately follow its instruction on the elements of insider trading.

We reject Shelby's selective reading of the jury instructions. In the jury instructions related to insider trading, the district court stated that "the law forbids [a person possessing insider information] from using that insider information in buying or

[9] Shelby conducted four trades in June and July of 2000. He sold shares of Enron stock on June 26, June 27, June 29, and July 19. The sale on July 19 involved options different from those involved in the June sales, which vested in late June. It is not clear from the record, however, when the options Shelby exercised in July vested. But because the July sale was so close in time to the June sales, we find that the jury could have reasonably decided that all of the summer 2000 trades were motivated by Shelby's distrust of the stock market.

selling the securities in question." The district court further explained that "[a] person 'uses' material, non-public information in connection with a stock purchase or sale if that information is a factor in his decision to purchase the stock." Therefore, these instructions were clear that the jury had to acquit Shelby of insider trading if it did not find that Shelby both: (1) had insider information and (2) was motivated by this information when he traded.

Because we find that the jury could have acquitted Shelby of the Summer 2000 Insider Trading Counts by concluding that these trades were not motivated by insider information, collateral estoppel does not preclude a retrial of the Early 2000 Insider Trading Counts and the securities fraud count. Shelby is correct that collateral estoppel would bar the Government from retrying Shelby on the Early 2000 Insider Trading Counts if the jury determined that he also did not use insider information when he conducted these trades. The jury, however, did not necessarily make this finding. In acquitting Shelby of the later counts, the jury could have differentiated between the two different sets of trades. The jury could have found that Shelby did not use insider information when he conducted the trades that underlie the Summer 2000 Insider Trading Counts but did use insider information when he conducted the trades that underlie the Early 2000 Insider Trading Counts.

The evidence at trial supports this distinction. In the summer of 2000, Shelby traded after exercising options as soon as they vested. But from January through March of 2000, Shelby traded after exercising options that vested in June 1999. From this delay, the jury could have rationally concluded

that Shelby purposely waited for the stock price to go up before exercising his 1999 options and that Shelby knew the price would go up because of his knowledge of insider information.[10] In contrast, Shelby exercised his 2000 options immediately after they vested. Thus, because the jury could have made this timing distinction, it did not necessarily make a factual determination that would bar a subsequent prosecution on the Early 2000 Insider Trading Counts.[11]

Similarly, the four insider trading acquittals do not estop the Government from retrying Shelby for securities fraud. As discussed above, the jury could have acquitted Shelby of the four insider trading counts because it concluded that he did not

[10] Shelby alleges that he did not exercise his 1999 options immediately after they vested because the market price of Enron stock at the time was lower than the option strike price. Moreover, Shelby contends that he exercised these options in 2000 when "they now had value." But evidence indicates that Enron stock "had value" long before the time he conducted his trades. The price of Enron stock began to rise precipitously in late November 1999. Therefore, Shelby's argument is unpersuasive because Shelby could have exercised those options in late 1999 instead of waiting until the stock price was well above the strike price.

[11] Shelby alleges that the jury could not have made a timing distinction when it acquitted him of the Summer 2000 Insider Trading Counts because neither the Government nor Shelby argued this distinction at trial. Moreover, Shelby points out that he had the same defense against all the insider trading counts: he traded because he was uncomfortable in the stock market, and he followed the advice of his friend, Berberian. From the evidence presented at trial, however, we find that the timing distinction is obvious and one that the jury could have made on its own. Therefore, the jury could have accepted Shelby's defense for one set of counts and not the other.

use insider information in making the underlying trades. But this determination is not dispositive as to whether Shelby engaged in securities fraud. "Using" insider information in making trades is not an element of securities fraud.[12] Therefore, because the jury could have acquitted Shelby by concluding that he did not use insider information, Shelby has not shown that the jury necessarily made a factual determination that would bar a retrial of the securities fraud count.

2. Rule 29 Acquittals

We reject Shelby's contention that his Rule 29 wire fraud acquittals collaterally estop the Government from retrying him on insider trading or securities fraud. After the jury rendered its verdict,

[12] The district court instructed the jury that it could convict Defendants of securities fraud if it found that the Government had proven three essential elements beyond a reasonable doubt:

> First: That in connection with the purchase or sale of Enron stock, the defendant did any one or more of the following:
>
> (1) employed a device, scheme, or artifice to defraud as charged in the Indictment; or
>
> (2) made any untrue statement of a material fact, or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading as charged in the Indictment; or
>
> (3) engaged in an act, practice, or course of conduct that operated, or would operate, as a fraud and deceit on any person as charged in the Indictment;
>
> Second: That the defendant acted willfully, knowingly, and with the intent to defraud; and
>
> Third: That the defendant used, or caused to be used, any means or instrumentality of interstate commerce or of the mails.

the district court granted Shelby's Rule 29 motion for judgment of acquittal on the money laundering counts and the wire fraud counts.[13] While Rule 29 acquittals may collaterally estop the government from bringing a subsequent prosecution, *see United States v. Bernhardt*, 840 F.2d 1441, 1447-48 (9th Cir. 1988), we find that they do not preclude a retrial in this case.

As with jury acquittals, Rule 29 acquittals collaterally estop the government from relitigating only the factual issues that were necessarily decided to reach the verdict. *See id.* at 1448. Because courts issue Rule 29 acquittals, collateral estoppel in this scenario applies to the factual determinations the court, and not the jury, made to acquit. Here, the district court granted Shelby's Rule 29 motion for judgment of acquittal on the wire fraud counts because it found that there was no evidence that Shelby had any involvement with the allegedly fraudulent press releases underlying those counts. According to the district court, the Government could not prove that Shelby used interstate wire communications facilities to carry out an illegal scheme without this evidence.[14] Whether Shelby

[13] Shelby does not allege that the Rule 29 money laundering acquittals have any collateral estoppel effect.

[14] At trial, the district court instructed the jury that it could convict Defendants of wire fraud only if the Government proved:

> First: That the defendant[s] knowingly devised or intended to devise a scheme to defraud, as described in the indictment;
>
> Second: That the defendant[s] acted with a specified intent to defraud;
>
> Third: That the defendant[s] used or caused another person to use interstate wire communications

used interstate wire communications, however, is not essential to either insider trading or securities fraud. Therefore, we find that the Rule 29 wire fraud acquittals do not bar the Government from retrying the remaining insider trading counts or the securities fraud count.[15]

B. Joseph Hirko

Hirko was acquitted of twelve counts of money laundering related to monetary transactions he conducted in 2000 ("the Money Laundering Counts") and two counts of insider trading related to his sale of Enron stock in February and April 2000. The jury hung on the conspiracy to commit securities and wire fraud count, the securities fraud count, four counts of wire fraud, and five counts of insider

> facilities for the purpose of carrying out the scheme; and
>
> Fourth: That the scheme to defraud employed false material representations.

[15] Shelby asserts that the absence of evidence that he participated in the press releases establishes that he was not part of a scheme to defraud, rather than that he did not use interstate wire communications facilities. According to Shelby, he stipulated to having used interstate communications at trial. Therefore, he argues that the district court should have granted his Rule 29 motion for judgment of acquittal on the wire fraud counts by finding that he was not involved in a scheme to defraud. Moreover, he contends that we should apply collateral estoppel using this finding instead of the one the district court actually made.

Shelby's argument lacks merit. The district court was clear that it granted Shelby's Rule 29 motion because it found that he did not use interstate communications. Even assuming that Shelby is correct that the district court erred in making this finding, Shelby cites no case law that allows us to apply collateral estoppel based on what the court should have found instead of what it explicitly claimed to have found.

trading. Hirko now contends that the acquittals on the 2000 Money Laundering Counts collaterally estop the Government from retrying him on the securities fraud count, the wire fraud counts, and the two remaining insider trading counts related to his May 2000 trades.[16] We find Hirko's argument unconvincing.

To acquit him on the Money Laundering Counts, Hirko contends, the jury must have found that he did not engage in insider trading when he sold shares of Enron stock in May 2000 or commit securities fraud or wire fraud. A party commits money laundering by "knowingly engag[ing] in a monetary transaction in criminally derived property of a value greater than $10,000." *United States v. Freeman*, 434 F.3d 369, 377 (5th Cir. 2005). At trial, Hirko stipulated to having engaged knowingly in monetary transactions involving more than $10,000. Both parties also acknowledged that the bulk of the funds involved in the transactions underlying the Money Laundering Counts came from Hirko's sale of Enron stock in 2000. Therefore, Hirko argues, the only issue the jury had to decide to convict him on the Money Laundering Counts was whether his sale of Enron stock was unlawful, making these funds "criminally derived." Because of the way the Government tried the case, Hirko alleges that the jury could have found that his 2000 sales were

[16] Because Hirko does not contend that collateral estoppel bars the Government from retrying him on insider trading related to his 2001 trades, we do not address these counts here. Therefore, when we refer to "insider trading" as it relates to Hirko, we are referring only to insider trading related to his 2000 trades.

unlawful if it concluded that he committed securities fraud, wire fraud, or insider trading.

While the Government charged him with having committed various different types of fraud, Hirko argues that the Government contended at trial that all of these fraudulent acts were part of a grand scheme to defraud the investing public. According to Hirko, the Government claimed that Defendants made material misrepresentations and omissions, thereby committing securities fraud and wire fraud, to "pump Enron's stock price" so that they could then profit from insider trading by selling their shares of Enron stock at the artificially inflated price. Under the Government's theory, all of Hirko's allegedly fraudulent acts played a role in generating the funds involved in the Money Laundering Counts, and Hirko contends that the district court instructed the jury to that effect.[17] In the jury instructions for

[17] The district court instructed the jury that it could convict Defendants of money laundering if it found that the Government had proven five essential elements beyond a reasonable doubt:

> First: That the defendant engaged or attempted to engage in a monetary transaction;
>
> Second: That the monetary transaction involved criminally derived property of a value greater than $10,000;
>
> Third: That the property was in fact derived from a specified unlawful activity, that is, wire fraud in violation of Title 18, United States Code, Section 1343, and fraud in the sale of securities in violation of Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5;
>
> Fourth: That the defendant acted knowingly, that is, with knowledge that the transaction involved proceeds of a criminal offense; and

money laundering, the district court explained that funds were criminally derived in this case if the jury determined that Hirko transacted in funds resulting from wire fraud, securities fraud, or insider trading. Therefore, Hirko contends that the jury could have acquitted him of the Money Laundering Counts only by finding that he did not commit securities fraud, wire fraud, or insider trading.

Hirko's argument falls under its own weight. Under the jury instructions for money laundering, the Government must prove that the funds transacted were "derived from a specified unlawful activity," which the district court defined as "wire fraud" or "fraud in the sale of securities."

Because Hirko stipulated to the other elements, he contends that the jury concluded that he did not commit any of these acts when it acquitted him of the Money Laundering Counts. But Hirko's analysis is flawed because, under his argument, the jury must find that he committed "a specified unlawful activity" as a precondition to convicting him on the Money Laundering Counts. Thus, if the jury could not decide whether Hirko committed "a specified unlawful activity," then it would have to acquit him on the Money Laundering Counts.

In fact, that is seemingly what happened here. In addition to money laundering, Hirko was also charged with securities fraud, wire fraud, and insider trading, and the jury hung on these counts. Since it could not determine whether Hirko committed these acts, the jury then could not convict Hirko on the Money Laundering Counts and had to

> Fifth: That the transaction took place in the United States.

acquit. Because Hirko has failed to show that the jury necessarily found that he did not commit fraud or insider trading, collateral estoppel does not bar the Government from retrying Hirko on the securities fraud, wire fraud, and the insider trading counts.

C. F. Scott Yeager

Yeager was acquitted of securities fraud, four counts of wire fraud, and conspiracy to commit securities fraud and wire fraud. The jury hung on 20 counts of insider trading and 99 counts of money laundering. Yeager now argues that, in acquitting him, the jury necessarily found that he did not have insider information, and, therefore, collateral estoppel bars the Government from retrying him on insider trading and money laundering. For the reasons below, we find that Yeager is correct that the jury, acting rationally, could have acquitted Yeager on securities fraud only by concluding that he did not have insider information. But because Yeager was also charged with insider trading and money laundering and the jury hung on those counts, we find that collateral estoppel, under our precedent, does not bar a retrial in this case.

1. Securities Fraud

Considering only the jury instructions, we conclude that there are four rational bases the jury could have used to acquit Yeager on securities fraud. The Government charged Yeager with securities fraud for making material misrepresentations or omissions at the 2000 analyst conference. As discussed above, the district court instructed the jury that it could convict Yeager on securities fraud only if it determined that the Government had proven three elements beyond a reasonable doubt:

(1) Yeager participated in making material misrepresentations or omissions; (2) Yeager acted "willfully, knowingly, and with the intent to defraud"; and (3) Yeager used "[a] means or instrumentality of interstate commerce or of the mails." Because neither party contends that the third element is at issue, the jury must have decided, in acquitting Yeager, that the Government did not carry its burden as to the first or second elements. Two reasons the Government might not have succeeded in carrying its burden as to the first element are: (1) it failed to show there were misrepresentations or omissions made at the analyst conference; or (2) it failed to show that Yeager participated in making material misrepresentations or omissions. Two reasons the Government might not have succeeded in carrying its burden as to the second element are: (1) it failed to show that Yeager knew the presentations given at the analyst conference were fraudulent when they were made; or (2) it failed to show that any misrepresentations or omissions Yeager made were intentional rather than negligent.

After reviewing the record, we conclude that the jury could have acquitted Yeager on the basis of the first element by concluding that there were no misrepresentations or omissions made at the conference. At trial, Defendants presented evidence that the conference presentations did not contain falsehoods and that the omitted information was not material so as to render the presentations misleading. The jury could have found this evidence convincing.

We also conclude, however, that the jury could not have acquitted Yeager by finding that, while

there were misrepresentations or omissions made, Yeager did not participate in making them. While both parties acknowledge that Yeager did not give a presentation at the analyst conference, the Government argued strenuously at trial that Yeager helped shape the message of the conference presentations, which Yeager did not dispute. Under the jury instructions, Yeager participated in making material misrepresentations or omissions as long as he "caused the statement[s] to be made or the fact[s] to be omitted." Therefore, if the jury concluded that the presentations were fraudulent, the jury could not have acquitted Yeager on the grounds that he did not participate in the fraud.

From our examination of the record, we additionally find that the jury could have acquitted Yeager on the basis of the second element by finding that Yeager did not knowingly make misrepresentations and omissions because he believed the presentations were truthful. Yeager's main defense at trial was that he thought the conference presentations were truthful because of his good faith reliance on information that he received from others. Therefore, the jury could have acquitted Yeager for this reason.

We conclude, however, that the jury could not have acquitted Yeager for negligently making material misrepresentations or omissions. The district court instructed the jury that Defendants must have been at least reckless when making material misrepresentations or omissions to be guilty of securities fraud. But it was undisputed that Yeager, as Senior Vice President of Strategic Development, helped plan the conference message. Therefore, if the jury determined that Yeager

possessed information that contradicted the presentations, the jury could not have found that he was negligent in dispensing falsehoods to the public.

In sum, our review of the record demonstrates that the jury could have acquitted Yeager of securities fraud for two reasons: (1) there were no material misrepresentations or omissions made at the conference; or (2) Yeager did not knowingly make misrepresentations or omissions because he believed the presentations were truthful. Under either rationale, the jury must have found when it acquitted Yeager that Yeager himself did not have any insider information that contradicted what was presented to the public.[18] The insider trading counts are based on allegations that Yeager had insider information when he conducted his trades because he knew that the information released to the public was fraudulent. Therefore, the jury seemingly made a finding that precludes the Government from now prosecuting him on insider trading and money laundering.[19] Accordingly, when we consider the

[18] The Government did not contend at trial nor does it contend here that Yeager could have discovered insider information after the conference. Therefore, if the jury found that Yeager did not have insider information at the conference, it must also have found that he did not have insider information when he conducted his trades in the subsequent months.

[19] Yeager is charged with money laundering based on transacting in money generated from trades he conducted allegedly on the basis of insider information. Therefore, the finding that Yeager did not have insider information would also preclude the Government from retrying him for money laundering.

acquittals by themselves, it appears that Yeager is correct that collateral estoppel bars a retrial.[20]

The problem in this case, however, is that the same jury hung on the insider trading counts. If Yeager is correct that the jury found that he did not have insider information, then the jury, acting rationally, would also have acquitted Yeager of the insider trading counts. Thus, when we consider the hung counts along with the acquittals, we are faced with a potential inconsistency, making it impossible for us to decide with any certainty what the jury necessarily determined. Whether we can weigh hung counts in applying collateral estoppel then is crucial to our analysis. Because, as discussed below, we conclude that our precedent dictates that we must, we find that we cannot apply collateral estoppel in this case.

2. United States v. Larkin

We have addressed before the question of how collateral estoppel applies when the jury acquitted on some counts but hung on related counts. In *United States v. Larkin*, we rejected the defendant's assertion that the jury necessarily determined that he was not part of a conspiracy when it hung on the conspiracy count but acquitted him of various counts of vicarious liability. 605 F.2d 1360, 1370 (5th Cir.

[20] Yeager also was acquitted of four counts of wire fraud and conspiracy to commit securities fraud and wire fraud. Yeager argues that, in acquitting him of these counts, the jury must also have found that he did not possess insider information. Because we determine that Yeager is correct that the jury must have so concluded when it acquitted him of securities fraud, it is unnecessary for us to determine whether the jury made the same conclusion when it acquitted Yeager of these other counts.

1979), *withdrawn in part on other grounds*, 605 F.2d 585 (5th Cir. 1980). In applying *Ashe*, the *Larkin* court laid out the various rational bases on which the jury could have acquitted the defendant. *Id.* We then ruled out the possibility that the jury acquitted the defendant of vicarious liability because it found that he was not a member of a conspiracy. *Id.* at 1370-71. According to the Court, "No rational jury could have absolved [him] of [vicarious liability] because of the absence of a conspiracy between the two, while it simultaneously failed to acquit him on the conspiracy charge itself." *Id.* Therefore, *Larkin* requires that we consider mistried counts in our collateral estoppel analysis; and, in particular, under *Larkin*, the presence of mistried counts diminishes the likelihood that, in acquitting defendants on related counts, the jury made a factual determination that bars a retrial.

Yeager contends that collateral estoppel precludes the Government from retrying him for insider trading and money laundering. According to Yeager, the jury necessarily determined that he did not have insider information when it acquitted him and that no jury can convict him on insider trading and money laundering if he did not have insider information. But even if Yeager is correct that the jury could have acquitted him on the fraud and conspiracy counts only if it found that he did not have insider information, that does not end our inquiry as to what the jury necessarily decided at trial because, under *Larkin*, we must also take into consideration the mistried counts. As we similarly noted in *Larkin*, if Yeager is correct that the jury found that he did not have insider information, then the jury, acting rationally, would have acquitted him

of insider trading and money laundering. Instead, the jury hung.

The result is a discrepancy that has four possible explanations. One possibility is that the jury was irrational and came to two inconsistent conclusions. When considering the fraud and conspiracy counts, the jury decided that Yeager did not have insider information. When considering the insider trading and money laundering counts, the jury decided that Yeager had insider information but hung for other reasons. Another possibility, as the Government speculates, is that the jury decided that Yeager had insider information when considering both sets of counts, but, for some unknown reason, it nonetheless acquitted Yeager on some of them. A third possibility is that the jury decided that Yeager did not have insider information when considering both sets of counts, but, for some unknown reason, it failed to push all of them through to acquittals. Finally, a fourth possibility is that the jury decided that Yeager did not have insider information when it acquitted him on the fraud and conspiracy counts and simply did not reach the issue when it considered the hung counts because it could not agree on whether the Government had carried its burden as to the other elements.

Because it is impossible to determine why the jury hung, we find that collateral estoppel does not bar a retrial in this case. In the first scenario, collateral estoppel would not bar a retrial because, if the jury irrationally came to two inconsistent conclusions, we cannot say that it came to any definitive conclusion. In the second scenario, collateral estoppel would not bar a retrial because the jury found that Yeager had insider information.

In the third and fourth scenarios, however, collateral estoppel would preclude a retrial because the jury concluded that Yeager did not have insider information. Under *Ashe*, however, the burden is on defendants to show that the jury necessarily determined the issue that they seek to foreclose. *Brackett* 113 F.3d at 1398. Given the evidence at trial, whether Yeager had insider information was a close issue, and the jury could have come to the conclusions in any of these four scenarios. Therefore, we cannot determine with any certainty which scenario Yeager's case falls under, and we cannot conclude what the jury necessarily decided. Because Yeager failed to carry his burden and establish what the jury necessarily decided, we find that collateral estoppel does not bar the Government from retrying Yeager on the insider trading and money laundering counts.

3. United States v. Powell

Finally, we note that we are not extending, at the Government's urging, *United States v. Powell*, 469 U.S. 57 (1984), to preclude applying collateral estoppel where a jury acquitted defendants on some counts but hung on related counts. Many of our sister circuits have rejected this argument in similar cases. *United States v. Ohayon*, 483 F.3d 1281, 1289 (11th Cir. 2007); *United States v. Romeo*, 114 F.3d 141, 144 (9th Cir. 1997); *United States v. Bailin*, 977 F.2d 270, 276 (7th Cir. 1992); *United States v. Frazier*, 880 F.2d 878, 883 (6th Cir. 1989). *Contra United States v. White*, 936 F.2d 1326 (D.C. Cir. 1991). Because our finding does not rely on *Powell*, however, these cases do not affect our analysis.

Powell bars applying collateral estoppel in cases where there are inconsistent verdicts. In *Powell*, the Court found that collateral estoppel cannot apply to reverse a conviction when the jury both acquitted and convicted defendants of related counts.[21] *Powell*, 469 U.S. at 68. According to the Court, the doctrine of collateral estoppel is "no longer useful" when the same jury reached inconsistent verdicts because collateral estoppel is "predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict." *Id.*

In the cases before our sister circuits, the Government has argued, as it does here, for an extension of *Powell*. The Government maintains that *Powell* precludes applying collateral estoppel in cases where the jury acquitted defendants on some counts but hung on related counts because this result is also inconsistent. The Sixth, Seventh, Ninth, and Eleventh Circuits rejected this argument because they found that acquittals are not inconsistent with mistried counts. *Ohayon*, 483 F.3d at 1289; *Romeo*, 114 F.3d at 144; *Bailin*, 977 F.2d at 279-80; *Frazier*, 880 F.2d at 883. As the Sixth Circuit noted, "[n]o such inconsistency is necessarily present" because "[b]oth the acquittal and the failure to agree could result from a number of factors." *Frazier*, 880 F.2d at 883.

[21] In *Powell*, the defendant was acquitted of various drug felonies but convicted of facilitating those felonies. 469 U.S. at 60. Because an element of the facilitation counts is that she committed the felonies that she allegedly facilitated, the defendant argued that collateral estoppel required overturning the convictions. *See id.* at 68. The Court found the defendant's argument unconvincing. *Id.*

While we arrive at what appears to be a contrary decision, we do not disagree with our sister circuits. As we acknowledged above, there are four possibilities as to how to reconcile Yeager's acquittals with the mistried counts, and only in one of these possibilities must the jury have been inconsistent. In short, we concur with our sister circuits that it is impossible to discern definitively why a jury hung. Therefore, we also reject the Government's argument because it requires us to necessarily find an inconsistency where one may not exist.

Where we part ways with our sister circuits is that they ignored the mistried counts after they determined that *Powell* does not apply. Because our precedent dictates that we weigh mistried counts, however, we cannot do the same. Under *Ashe*, the burden is on defendants to show that the jury necessarily determined the issue they seek to foreclose in their favor. Therefore, collateral estoppel cannot apply if the uncertainty raised by the mistried counts, which we must consider under *Larkin*, precludes Yeager from meeting this burden. For the reasons above, we find that it does.[22] In sum, we agree with our sister circuits that *Powell* does not bar applying collateral estoppel when a jury acquitted defendants on some counts but hung on related counts. But we conclude that *Ashe* precludes applying collateral estoppel in this scenario because

[22] We can only speculate as to why our sister circuits did not also consider the mistried counts in its analysis under *Ashe*. While our precedent requires us to weigh mistried counts in determining whether collateral estoppel applies under the *Ashe* framework, the other circuits may not be similarly bound by their precedent.

Yeager has failed to show that the jury necessarily determined that he did not have insider information.

IV.

For the aforementioned reasons, we AFFIRM the district court's denial of Defendants' motion to dismiss under the doctrine of collateral estoppel.

APPENDIX B

446 F. Supp. 2d 719

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	Criminal
	§	Action No.
SCOTT YEAGER (6)	§	H-03-0093
	§	

AMENDED ORDER*

Pending before the Court is Defendant Scott Yeager's Motion to Dismiss Counts 27 through 46 and 67 through 165 on Fifth-Amendment Collateral-Estoppel Grounds (Instrument No. 885), filed on September 2, 2005. Also pending before the Court is Defendant Yeager's Motion to Dismiss the Eighth Superseding Indictment on Fifth Amendment Collateral-Estoppel Grounds, or in the Alternative, on Statute of Limitations Grounds (Instrument No. 940), filed on December 16, 2005.

I.

* This Order was amended to correct minor citation and typographical errors prior to publication.

On March 11,2003, the United States of America filed a multiple-count Indictment against Defendants Joseph Hirko, Kevin Howard, Scott Yeager, Rex Shelby, Michael Krautz (hereinafter "Defendants") and former Defendants Kenneth Rice and Kevin Hannon, charging them with conspiracy to commit wire fraud and securities fraud, and substantive counts of wire fraud, securities fraud, insider trading, and money laundering. The government filed a Fourth Superseding Indictment on July 22, 2004. (Instrument No. 340). On November 5, 2004, the government filed a Fifth Superseding Indictment. (Instrument No. 468). During the relevant times in the Indictment, Defendants served in various positions as executives to Enron Communications, Inc., later renamed to Enron Broadband Services ("EBS").

In the Fifth Superseding Indictment, Count One charged Defendant Yeager with conspiracy to commit securities fraud and wire fraud. (Instrument No. 468). Count Two of the Indictment charged Defendant Yeager with the substantive offense of securities fraud in connection with allegedly false statements and material omissions at a January 20, 2000 Analyst Conference. (*Id.*). Counts Three through Six charged Defendant Yeager with the substantive offense of wire fraud in connection with press releases issued by Enron Broadband Services on January 31, 2000 through May 15, 2000. (*Id.*). Counts Twenty-Seven through Forty-Six charged Defendant Yeager with insider trading based on trades of Enron stock made on January 21, 2000 through August 23, 2000. (*Id.*). Counts Sixty-Seven through One Hundred Sixty-Five charged Defendant Yeager with money laundering based on

transactions on February 7, 2000 through September 18, 2001. (*Id.*).[23]

On April 18, 2005, through July 13, 2005, this Court conducted a jury trial on all of the charges pending against the Defendants. On July 20, 2005, the jury returned a verdict of not guilty against Defendant Scott Yeager on conspiracy to commit wire fraud and securities fraud, and the substantive counts of securities fraud and wire fraud. (Instrument No. 869). The jury did not enter a verdict on the insider trading and money laundering counts pending against Defendant Yeager, and indicated that they were hopelessly deadlocked. (*Id.*). On November 9,2005, the government filed an Eighth Superseding Indictment charging Defendant Yeager with insider trading and money laundering, indicating its intention to retry Defendant Yeager on the insider trading and money laundering counts on which the jury failed to render a verdict. (Instrument No. 912).

The Eighth Superseding Indictment charges Defendant Yeager with several counts of insider trading and money laundering, but removes counts that were subject to acquittal in the prior proceeding. The Eighth Superseding Indictment also removes certain counts that the government elected not to include in the Eighth Superseding Indictment, and sets forth factual allegations that

[23] Each of the Counts against Defendant Yeager incorporated the same factual allegations stated in Paragraphs 1 through 33 of the Indictment. Specifically, each Count stated that "[t]he allegations in paragraphs 1 through 33 ... are realleged as if fully set forth here." The Counts then set forth the specific charges against Defendant Yeager. (*See, e.g.*, Count One, below).

provide a more detailed description of the inside information that Defendant Yeager allegedly possessed at the time he made trades of Enron stock. A comparison of the counts alleged in the Fifth Superseding Indictment and the Eighth Superseding Indictment is set forth below.

United States v. Scott Yeager
(Cr. No. 03-0093-8)
Conversion Chart for Counts
Relating to Scott Yeager

5th Superseding Indictment *United States v. Hirko, et al.* (Cr. No. 03-0093-5)	8th Superseding Indictment, *United States v. Scott Yeager* (Cr. No. 03-0093-8)
1 (Conspiracy to Commit Securities and Wire Fraud)	N/A
2 Securities Fraud: 2000 Analyst Conference	N/A
3 (Wire Fraud - 1/31/00 Press Release)	N/A
4 (Wire Fraud - 3/30/00 Press Release)	N/A
5 (Wire Fraud - 4/11/00 Press Release)	N/A
6 (Wire Fraud - 5/15/00	N/A

United States v. Scott Yeager
(Cr. No. 03-0093-8)
Conversion Chart for Counts
Relating to Scott Yeager

Press Release)	
27 (Insider Trading - Scott Yeager)	1
28 (Insider Trading - Scott Yeager)	2
29 (Insider Trading - Scott Yeager)	3
30 (Insider Trading - Scott Yeager)	4
31 (Insider Trading - Scott Yeager)	5
32-46 (Insider Trading - Scott Yeager)	N/A
67 (Money Laundering)	6
68 (Money Laundering)	7
69 (Money Laundering)	8
70 (Money Laundering)	9

United States v. Scott Yeager
(Cr. No. 03-0093-8)
Conversion Chart for Counts
Relating to Scott Yeager

71 (Money Laundering)	10
72 (Money Laundering)	11
73 (Money Laundering)	12
74-80 (Money Laundering)	N/A
81 (Money Laundering)	13
82-165 (Money Laundering)	N/A

*N/A indicates that a particular count was either the subject of an acquittal in the prior proceeding or the government has elected not to include it in the 8th Superseding Indictment.

On September 2, 2005, Defendant Yeager filed a Motion to Dismiss Counts 27 through 46 and 61 through 165 on Fifth-Amendment Collateral-Estoppel Grounds (Instrument No. 885). Under the Double Jeopardy Clause of the Fifth Amendment and Doctrine of Collateral Estoppel, Defendant Yeager moves to dismiss Counts 27 through 46 (insider trading) and Counts 67 through 165 (money laundering) of the Fifth Superseding Indictment, arguing that the crimes charged in those counts were effectively litigated and decided against the government at the first trial. (Instrument No. 885). In support of his Motion to Dismiss Counts 27

through 46 and Counts 67 through 165 of the Fifth Superseding Indictment, Defendant Yeager argues that "[t]he grand jury incorporated paragraphs 1-33 as the sole description of the scheme in each charged offense: conspiracy, securities fraud at the 2000 Analyst Conference, wire fraud relating to allegedly false press releases, insider trading, and money laundering." (Instrument No. 885, at 1). Thus, Defendant Yeager argues that "[b]y acquitting him on Counts One to Six of the Indictment, the jury rejected Yeager's participation in the scheme described in Paragraphs 11 to 33," which also include the only grounds for the alleged insider trading counts. (*Id.* at 2). As such, Defendant Yeager argues that retrial on the insider trading counts and dependent money laundering counts are prohibited by the Fifth Amendment on collateral estoppel grounds.

In the alternative, Defendant Yeager seeks a suppression order prohibiting the government "from revisiting the factual issues decided by the first jury verdict . . . that (1) Yeager did not make, conspire to make, or aid and abet false statements at the 2000 Analyst Conference, (2) Yeager did not participate in a conspiracy with the other defendants, (3) Yeager did not make, conspire to make, or aid and abet false statements in the press releases charged in Counts Three through Six, and (4) Yeager did not participate in the scheme to defraud described in Paragraphs 1 to 33 of the Indictment." (*Id.* at 19-20). On the basis of collateral estoppel, Defendant Yeager further seeks to prohibit the introduction of evidence related in any way to the counts upon which the jury returned verdicts of not guilty (Counts 1-6), including evidence relating to the press releases and 2000 Analyst Conference. (*Id.* at 25).

On December 16, 2005, Defendant Yeager filed a Motion to Dismiss the Eighth Superseding Indictment on Fifth Amendment Collateral-Estoppel Grounds, or in the Alternative, on Statute-of-Limitations Grounds. (Instrument No. 940). Defendant Yeager's Motion to Dismiss the Eighth Superseding Indictment On Collateral-Estoppel Grounds is basically a reiteration of Yeager's original Motion to Dismiss the Fifth Superseding Indictment on Collateral-Estoppel Grounds. Both motions present substantially similar arguments, thus the Court will address the Motion to Dismiss the Eighth Superseding Indictment after resolving the issues presented by Yeager's original Motion to Dismiss the Fifth Superseding Indictment. In the alternative, Defendant Yeager argues that the new insider trading charges in the Eighth Superseding Indictment broaden or substantially amend the charges in the Fifth Superseding Indictment, and that the new charges are barred by the statute of limitations. (Instrument No. 940, at 18). The Court also addresses these issues separately.

II.

The Supreme Court has stated that the principle of collateral estoppel in criminal cases is embodied in the Fifth Amendment's proscription against double jeopardy. *Ashe v. Swenson*, 397 U.S. 436 (1970). Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. According to the Supreme Court:

> [T]he rule of collateral estoppel in criminal cases is not to be applied with the

> hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of the prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.

Id. at 443-44 (internal citations and quotations omitted).

In the Fifth Circuit, collateral estoppel may affect successive criminal prosecutions in one of two ways. First, "it will completely bar a subsequent prosecution if one of the facts necessarily determined in the former trial is an essential element of the subsequent prosecution." *United States v. Bracken*, 113 F.3d 1396, 1398 (5th Cir. 1997). Second, "while the subsequent prosecution may proceed, collateral estoppel will bar the introduction or argumentation of facts necessarily decided in the prior proceeding." *Id.* (citing *United States v. Deerman*, 837 F.2d 684, 690 (5th Cir. 1988)). "Facts so established in the first trial may not be used in the second trial either as ultimate or as evidentiary facts." *United States v. Mock*, 604 F.2d 341, 343 (5th Cir. 1979).

It is axiomatic that "collateral estoppel bars relitigation only of those facts necessarily determined in the first trial." *Brackett*, 113 F.3d at

1398 (quoting *Deerman*, 837 F.2d at 690). "When a fact is not necessarily determined in a former trial, the possibility that it may have been does not prevent re-examination of that issue." *Id.* at 1398-99 (quoting *United States v. Lee*, 622 F.2d 787, 790 (5th Cir. 1980) (emphasis in original)). Thus, "the first step in resolving a claim of collateral estoppel is to determine which facts were 'necessarily decided' in the first trial." *Id.* (citing *United States v. Levy*, 803 F.2d 1390, 1398-99 (5th Cir. 1986); *Mock*, 604 F.2d at 343). "At this first stage of the inquiry, the defendant bears the burden of demonstrating that the issue he seeks to foreclose was 'necessarily decided' in the first trial." *Id.* (citing *Dowling v. United States*, 493 U.S. 342, 350 (1990)).

In a criminal case, the determination of what the jury necessarily decided can be an "awkward" task, because "a general verdict of acquittal does not specify the facts 'necessarily decided' by the jury." *Id.* at 1399. Thus, in making the determination of what the jury necessarily decided, the court "must examine allegations of the indictment, testimony, court's instructions to the jury, and jury's verdict to consider what makes the jury's verdict coherent." *Deerman*, 837 F.2d at 690. This inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ashe*, 397 U.S. at 444 (quoting *Sealfon v. United States*, 332 U.S. 575, 579 (1948)). "Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Id.*

With these principles in mind, the Court first turns to the question of whether the government is completely barred from prosecuting Defendant Yeager on the charges contained in Counts 27 through 46 and 67 through 165 of the Fifth Superseding Indictment. Then, the Court will determine whether the government should be prohibited from offering evidence related to the counts upon which Defendant Yeager was found not guilty in the first trial.

III.

In this case, the Fifth Superseding Indictment charged Defendant Yeager and others with conspiracy to commit wire fraud and securities fraud (Count 1); securities fraud in connection with the 2000 Analyst Conference (Count 2); and wire fraud relating to press releases (Counts 3-6). The Indictment further charged Defendant Yeager individually for insider trading (Counts 27-46) and money laundering (Counts 67-165). (Instrument No. 468) (*See* chart above). After a 3-month trial by jury, the jury entered a verdict of "not guilty" on the conspiracy, securities fraud, and wire fraud counts against Defendant Yeager. The jury indicated that they were hopelessly deadlocked on the insider trading and money laundering counts against Defendant Yeager. The Court entered a mistrial on the deadlocked insider trading and money laundering counts, at the request of defense counsel.

Defendant Yeager contends that the government should be barred from prosecuting him on the insider trading and money laundering counts because (1) the acquitted conspiracy, securities fraud

and wire fraud counts allege the same factual allegations that underpin the insider trading counts, and (2) the evidence presented at trial on the acquitted counts pertaining to alleged false statements and omissions made at the 2000 Analyst Conference and in press releases, is the very same evidence the government submitted on the insider trading counts. With regard to the insider trading counts, Defendant Yeager specifically argues that "[a]t no point did the Government explain what material, nonpublic information Yeager was in possession of except by implication: when he allegedly made statements or omissions at the 2000 Analyst Conference and in press releases, Yeager knew that those statements were false, and that knowledge constituted material, nonpublic information that he was not permitted to trade on." (Instrument No. 885, at 12). Defendant Yeager further argues that the money laundering counts should be dismissed, because the money laundering counts are dependant on Yeager's receipt of proceeds from the insider trading offenses. (*Id.* at 2).

To resolve the issues presented by Defendant Yeager, the Court must review, among other things, the indictment, the jury charge and verdict, the theory of prosecution, the theory of defense, and the evidence presented at trial. The complexity of this determination is underscored by the incestuous nature of the factual allegations contained in the Indictment.

A.

Paragraphs 1 through 33 of the Fifth Superseding Indictment provide a broad introduction to the Enron Broadband case and alleged schemes to defraud. (Instrument No. 468).

Each of the counts of which Defendant Yeager was acquitted (conspiracy, securities fraud, and wire fraud) incorporate Paragraphs 1 through 33 of the Indictment. The remaining insider trading and money laundering counts, on which the jury was deadlocked, also incorporate Paragraphs 1 through 33. Paragraphs 1 through 10 of the Indictment provide a background description of the parties and Enron Broadband Services. The remaining Paragraphs, entitled "THE SCHEMES TO DEFRAUD," provide a summary of the alleged schemes to defraud, including the proposal to build the Enron Intelligent Network, a description of alleged false press releases, alleged false statements at the 2000 Analyst Conference, the Blockbuster Agreement and Project Braveheart transaction, alleged false statements at the January 2001 Analyst Conference, and "The Defendants' Stock Trading." (Instrument No. 468)[24]. Specifically, Paragraph 11 of the Indictment describes the overall summary of the schemes to defraud as follows:

> 11. From at least April 1999 until May 14, 2001, defendants, JOSEPH HIRKO, KEVIN HOWARD, SCOTT YEAGER, REX SHELBY, and MICHAEL KRAUTZ, together with others, engaged in conduct and made false and misleading statements and omitted material information from statements

[24] None of the allegations pertaining to the Blockbuster agreement, Braveheart Transaction, and alleged false statements at the January 2001 Analyst Conference are relevant to the charges and evidence against Defendant Yeager. Thus, the Court need not address these allegations in the context of the current Motion.

> made, all of which were designed to and did deceive the investing public and others about the technological capabilities, value, revenue and business performance of EBS. The defendants executed this scheme by, among other means: (i) causing Enron to issue materially false and misleading press releases; (ii) making and causing others to make materially false and misleading statements to equity analysts and others; (iii) using fraudulent means to generate revenue so that EBS and Enron could appear to reach publicly declared financial targets; and (iv) failing to disclose material adverse information about EBS's poor business performance. During this same time period, defendants HIRKO, YEAGER and SHELBY sold large quantities of Enron stock, generating millions of dollars for themselves.

(Instrument No. 468, at 3-4).

Paragraph 11 describes the overall scheme to defraud alleged in Count One of the Indictment. Count One of the Indictment alleges conspiracy to commit wire and securities fraud.[25] Count One also

[25] Specifically, Count One of the Indictment alleges as follows:

> 34. The allegations of paragraphs 1 through 33 are realleged as if fully set forth here.
>
> 35. On or about and between at least April 19, 1999 and May 14, 2001, both dates being approximate and

alleges several overt acts in furtherance of the conspiracy. Each of the allegations in the second sentence of Paragraph 11 pertain to the overt acts listed in Count One, and correspond to the alleged schemes to defraud in Counts Two through Twenty-Two of the Indictment. For example, the phrase "issue materially false and misleading press releases" refers to overt act "a." (False Press Release - 1999) and overt acts "e." through "h." (False Press Releases - 2000), which correspond to Counts 3-6 (Wire Fraud: April 1999 to July 2000). The phrase

> inclusive, within the Southern District of Texas and elsewhere, the defendants JOSEPH HIRKO, KEVIN HOWARD, SCOTT YEAGER, REX SHELBY and MICHAEL KRAUTZ, together with Kenneth Rice, Kevin Harmon, and others, did knowingly and intentionally conspire (1) willfully and unlawfully to use and employ manipulative and deceptive devices and contrivances and directly and indirectly (i) to employ devices, schemes and artifices to defraud; (ii) to make untrue statements of material fact and omit to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (iii) to engage in acts, practices, and courses of conduct which would and did operate as a fraud and deceit upon members of the investing public, in connection with the purchase and sale of Enron stock and by the use of the instruments of communication in interstate commerce and the mails, in violation of Title 15, United States Code, Sections 78j(b), 78ff and Rule 10b-5 of the SEC, Title 17, Code of Federal Regulations, Section 240.10b-5, and (2) to devise a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises, and, for the purpose of executing such scheme and artifice, to cause interstate wire communications in violation of Title 18, United States Code, Section 1343. (Instrument No. 468, at 13-14).

"making and causing others to make materially false and misleading statements to equity analysts" refers to overt acts "b." through "d." (The 2000 Analyst Conference) and overt acts "i." through "j." (The 2001 Analyst Conference), which correspond to Count 2 (Securities Fraud: January 2000 Analyst Conference).[26] None of the allegations in the second sentence of Paragraph 11 or the overt acts alleged in Count One directly correspond to the insider trading and money laundering counts against any of the Defendants.

The only allegation in Paragraph 11 that corresponds to the insider trading counts is set forth in the third sentence of Paragraph 11, and provides as follows: "During this same time period, defendants HIRKO, YEAGER and SHELBY sold large quantities of Enron stock." (Instrument No. 468, at 4). The allegations in the third sentence of Paragraph 11 are separate and apart from the allegations corresponding to the overt acts of Count One, and only provide for a temporal connection with the allegations of conspiracy to commit wire and securities fraud. Thus, according to the allegations of Paragraph 11, which the Court read in its charge to the jury, the insider trading counts are not alleged to be an integral part of the overall conspiracy.

Furthermore, the insider trading counts against Defendant Yeager do not rely upon allegations of false statements and omissions made

[26] Count 31 of the Fourth Superseding Indictment charged Defendants Kenneth Rice and Kevin Hannon with a separate cause of action for (Securities Fraud: 2001 Analyst Conference). However, the charge dropped out of the Fifth Superseding Indictment when Defendants Rice and Hannon pled guilty.

at the 2000 Analyst Conference and in press releases. The title of the insider trading counts does not mention the 2000 Analyst Conference and press releases, and nor does the text of the counts. However, the insider trading counts against Defendant Yeager, entitled "(Insider Trading: SCOTT YEAGER)," do specifically allege that "while in possession of material non-public information regarding the technological capabilities, value, revenue and business performance of Enron Communications, Inc. and Enron Broadband Services, YEAGER sold shares of Enron stock . . . ." (Instrument No. 468, at 22). Thus, although the insider trading counts incorporate the factual allegations of Paragraphs 1 through 33, the fate of the insider trading counts is not necessarily decided by the fate of the conspiracy, wire fraud, and securities fraud counts. In addition, the Eighth Superseding Indictment removes all reference to the conspiracy, securities fraud, and wire fraud counts of the Fifth Superseding Indictment. The Eighth Superseding Indictment does not allege that Yeager participated in a scheme to defraud with any other individual, and only refers to alleged inside information that Defendant Yeager allegedly received personally.

In order to further examine the interplay between the conspiracy, wire fraud, and securities fraud counts on which Defendant Yeager was acquitted, and the insider trading counts, the Court turns to the jury charge and verdict.

B.

The jury acquitted Defendant Yeager of Count One conspiracy to commit securities fraud and wire fraud. In order to establish the crime of conspiracy

the government needed to prove beyond a reasonable doubt that Defendant Yeager (1) made an agreement to commit the crime of wire or securities fraud; (2) knowingly and willfully joined into the agreement; and (3) one of the conspirators committed at least one overt act. (Jury Charge, at 14).

Ordinarily, an acquittal of a conspiracy count will not have a preclusive effect on the trial of a substantive offense. It is settled that a conspiracy to commit a crime is a distinct offense from the commission of the crime. *United States v. Brown*, 7 F.3d 1155, 1162 (5th Cir. 1993). "This is so even if commission of the crime is listed as an overt act in the conspiracy count." *United States v. Frazier*, 880 F.2d 878, 884 (6th Cir. 1989). Because the first element of a criminal conspiracy is an agreement to violate the law, the jury's verdict of acquittal on Count One could rationally have been based on a finding that Defendant Yeager did not agree to a scheme to commit wire and securities fraud. In such a case, the jury could have acquitted Defendant Yeager without ever considering whether Yeager committed the acts charged in the remaining counts of the Indictment, including the insider trading and money laundering counts, whether those acts were listed as overt acts of the conspiracy or not.

In *United States v. Mock*, 604 F.2d 341 (5th Cir. 1979), the Fifth Circuit recognized the problem of applying collateral estoppel to an acquittal of conspiracy. In *Mock* the Fifth Circuit made the following observations:

> Generally, it is true that a defendant may be acquitted of conspiracy without collaterally estopping the government from later

presenting the evidence necessary to convict him of the substantive crime which was the object of the conspiracy. *See United States v. Ballard*, 586 F.2d 1060 (5th Cir. 1978). In addition, since the charges require different elements of proof, double jeopardy would pose no bar to the subsequent prosecution. *See Pinkerton v. United States*, 328 U.S. 640 (1946); *Wingate v. Wainwright*, 464 F.2d 209, 214 (5th Cir. 1972). *Ashe* teaches, however, that we must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter," 397 U.S. at 444 (footnote omitted), in order to assess the applicability of collateral estoppel. The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Id.*, quoting *Sealfon v. United States*, 332 U.S. 575, 579 (1947). In taking this pragmatic approach, the court in *Sealfon*, while recognizing that conspiracy and the substantive offense are different for double jeopardy purposes, nevertheless held that an acquittal on the charge of conspiracy to defraud the United States prohibited the government from later trying to prove that the defendant committed the substantive offense of defrauding the United States, since "the core of the prosecutor's case was in each case the same . . .." 332 U.S. at 580.

Mock, 604 F.2d 341, 344. Thus, the fact that the jury reached a verdict of acquittal on a conspiracy count, and not the insider trading count at issue, does not end the collateral estoppel analysis without further examination of the evidence in the record.

The Court must also examine the evidence presented at trial, and does so below.

In this case, however, the jury not only acquitted Defendant Yeager of the Count One conspiracy to commit wire and securities fraud, but also acquitted Defendant Yeager of the substantive counts of wire fraud and securities fraud. In order to establish the crime of wire fraud the government must prove beyond a reasonable doubt that the defendant (1) knowingly devised or intentionally devised a scheme to defraud; (2) acted with a specific intent to defraud; (3) used or caused another person to use interstate wire communications facilities for the purpose of carrying out the scheme; and (4) that the scheme to defraud employed false material representations. *United States v. Odiodio*, 244 F.3d 398, 402 (5th Cir. 2001); (Jury Charge, at 34).

In order to establish the crime of securities fraud, the government must prove beyond a reasonable doubt that (1) in connection with the purchase or sale of securities, the defendant either (i) employed a device, scheme, or artifice to defraud, or (ii) made any untrue statement or material omission of fact, or (iii) engaged in an act of fraud and deceit; and (2) acted willfully, knowingly, and with the intent to defraud; and (3) used, or caused to be used, any means or instrumentality of interstate commerce or of the mails. (Jury Charge, at 26).

The crime of insider trading requires proof beyond a reasonable doubt that (1) in connection with the purchase or sale of securities, the defendant employed a device, scheme, or artifice to defraud; (2) acted willfully, knowingly, and with the intent to defraud; (3) used, or caused to be used, any means or instrumentality of interstate commerce; and (4) used

material, nonpublic information in his purchase or sale of Enron stock. *United States v. Smith*, 155 F.3d 1051, 1066 (9th Cir. 1998); (Jury Charge, at 41-43). Under 15 U.S.C. § 78j(b) and Rule 10b-5, insider trading constitutes a separate and distinct offense from securities fraud based on "a relationship of trust and confidence between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation." *Chiarella v. United States*, 445 U.S. 222, 228 (1980); *see also United States v. O'Hagan*, 521 U.S. 642 (1997).

Each of the crimes of wire fraud, securities fraud, and insider trading requires proof beyond a reasonable doubt that the defendant knowingly devised or employed a scheme or artifice to defraud. However, insider trading does not require proof of a false or misleading statement or omission of material fact, as is required in a charge of wire fraud and was alleged in the securities fraud charges.[27] Conversely, wire fraud and securities fraud do not require proof that the defendant used material, nonpublic information in his purchase or sale of corporate stock. Here, the ultimate issue that Defendant Yeager seeks to foreclose from consideration is evidence that he used material nonpublic information in his sale of Enron stock. *See Wright v. Whitley*, 11 F.3d 542, 546 (5th Cir.

[27] For the crime of securities fraud, the making of an untrue statement or material omission of fact is ordinarily one of several acts that may satisfy the "scheme to defraud" element of securities fraud. Here, the government specifically alleged that Defendants "made false and misleading statements and omitted material information from statements made." (Instrument No. 468, at ¶ 11).

1994) (noting that collateral estoppel "only bars relitigation of a previously rejected factual allegation where that fact is an ultimate issue in the subsequent case").

Accordingly, the issue presented by Defendant Yeager ultimately asks the Court to determine whether the jury in the first trial rationally could have acquitted him of the schemes to defraud alleged in the conspiracy, securities fraud, and wire fraud charges without finding that he did not use material, nonpublic information in his sale of Enron Stock.[28] To resolve this issue, the Court must now turn to a review of the theory of the prosecution, the theory of defense, and the evidence presented at trial.

C.

This Court conducted an approximately three-month long jury trial on the charges against the Defendants, from April 18, 2005, through July 13, 2005. Over the course of the three-month long trial of the Defendants, the government presented a theory of prosecution that Defendants all

[28] The government argues that the ultimate issue in this case is whether Defendant Yeager "possessed" material, nonpublic information. However, the Court's Instructions to the Jury charges as follows: "It is not sufficient that the government proves that the defendant sold Enron stock while knowingly in possession of the material, nonpublic information. Rather, the government must prove beyond a reasonable doubt that the defendant in fact used that material, nonpublic information in his purchase or sale of Enron stock." Thus, the Court declines to base its analysis on mere "possession" of material nonpublic information. *See O'Hagan*, 521 U.S. at 656 (holding that "[t]he fiduciary's fraud is consummated, not when the fiduciary gains the confidential information, but when, without disclosure to his principal, he *uses the information* to purchase or sell securities.") (emphasis added).

participated in a single conspiracy aimed at falsely portraying the technological capabilities, value, revenue, and business performance of Enron Broadband Services. The government argued that the objective of the conspiracy was to increase the price of Enron stock, so that the Defendants could personally enrich themselves through stock sales, salary and performance bonuses. The government first presented evidence of the problems with EBS products and services leading up to the January 2000 Analysts Conference.

Specifically, the government presented evidence of problems with the Media Cast and Media Transport products. The government also presented testimony that the Interagent software did not function as network control software, and that the Enron Intelligent Network did not possess much intelligence. The government further presented evidence that the network had significant problems with security, an inability to control routers on the network, and an inability to perform billing and quality of service operations. In addition, the government presented evidence of internal arguments between EBS employees, including Rex Shelby, David Berberian, John Griebling, John Bloomer, Joe Hirko, and Scott Yeager. Finally, the government presented evidence of statements acknowledging some of the problems with EBS technological capabilities in the Applications Conference occurring two weeks prior to the January 2000 Analyst Conference.

As the first component of the scheme to defraud, the government presented press releases in the latter part of 1999, and testimony that the press releases did not comport with the problems facing

EBS.[29] The government further presented evidence of statements made at the January 2000 Analyst Conference. The government argued that Defendants made false and misleading statements about the EBS fiber network, proprietary software, and technological capabilities. Specifically, the government pointed to statements claiming EBS had an advanced network control software or BOS software, and argued that each statement was false, misleading, or omitted a material fact. The government further argued that Defendants continued to issue false press releases with the purpose of driving up the stock price. Finally, the government argued that Defendants Hirko, Shelby, and Yeager sold large blocks of Enron stock, in order to take advantage of the rising stock price, which resulted from the overall scheme to defraud the investing public at the 2000 Analyst Conference and in press releases. The government's Response to Defendants' Motions for Bill of Particulars and Severance, filed prior to trial on May 21, 2004, provides an additional view of the government's theory of prosecution:

> The indictment here does not allege multiple conspiracies, but rather a single scheme composed of different components all aimed at falsely portraying the commercial performance of Enron Broadband Services ("EBS") and the effectiveness of its products and services to the

[29] None of the press releases prior to January 2000 are actually charged as substantive offenses in the Fifth Superseding Indictment. However, the Indictment lists the issuance of an April 19, 1999 press release as an overt act of the Count One conspiracy to commit wire and securities fraud charge.

> investing public. The objective of this conspiracy was to increase the price at which Enron Corporation's common stock traded which, in turn, personally enriched the defendants through stock sales, salary and performance bonuses. The defendants accomplished the goals of this conspiracy through several methods. For example, in 1999 and the first half of 2000, the indictment alleges that [Yeager and others] orchestrated a series of false press releases claiming that EBS' "Enron Intelligent Network," or "EIN," possessed a sophisticated network control software layer that provided a number of unique features....Building on this publicity campaign, [Yeager and others] planned and presented a message at Enron's January 20, 2000 analyst conference reinforcing the claims made in the press releases that Enron had developed a unique and unprecedented layer of network control software, which it christened the "Broadband Operating System" or "BOS".....This pattern of misrepresentation had a direct impact on Enron's stock price, initially driving the stock up dramatically in January 2000 and then contributing to its rapid decline in 2001 after it became apparent to the investing public that EBS was a technical and commercial failure. [Yeager and others] also personally profited from the year-long stock price increase by selling vast quantities of stock.

(Instrument No. 271, at 10-12).

With regard to Defendant Yeager, the government introduced evidence of several emails,

indicating that Defendant Yeager received adverse nonpublic information about the capabilities of the Enron Intelligent Network and the business performance of Enron Broadband Services. (*See* GX D1080; D1081; D1085; D1088). Specifically, on November 18, 1999, John Bloomer sent an email to Yeager complaining about problems with product development, and difficulty working with the team under Rex Shelby. (GX D1088). In response, on November 21, 1999, Yeager sent an email to John Griebling and John Bloomer, in which Yeager expressed his frustration with the network, products and software efforts as well as with the people working on those efforts. (GX 3024). Defendant Yeager described an ongoing war between John Bloomer, David Berberian, Rex Shelby, Joe Hirko, and David Griebling. (*Id.*). Within the email Yeager made statements such as "[w]e will call version one of the cast product riding on our backbone the EIN even if the I is not very intelligent...," "Bloomer must have an operating network so the products are more dependent on the Network than some future definition of EIN...," and "I think we are very close to success and just a [sic] close to failure." The government further presented statements of Yeager at a January 9-11, 2000 ePowered Apps Employee Conference, where Yeager described the EIN's intelligence as being "in the first grade."

The government argued that Yeager failed to disclose this inside information about the problems with the EIN and within EBS, at the January 2000 Analyst Conference. The government further argued that the object of Defendant Yeager's alleged participation in the scheme to defraud and failure to disclose the "truth" about EBS at the January 2000 Analyst Conference, culminated in his sale of Enron

Stock when the public did not know the "truth" about EBS. The same inside information that Yeager allegedly failed to disclose at the January 2000 Analyst Conference is the same alleged inside information that the government claims Yeager possessed when he made trades of Enron stock. After the January 2000 Analyst Conference, the government introduced evidence that Defendant Yeager attended offsite meetings in February and March 2000, in which EBS employees reported on problems with EBS products, the network, and the EIN. However, the government introduced no evidence that Defendant Yeager played any role in the formation of the press releases underlying the wire fraud counts. The government also failed to make any connection between Defendant Yeager and the Blockbuster Agreement or Project Braveheart transaction.

The theory of the defense, evident in closing argument and the direct testimony of Defendant Yeager, argued that Defendant Yeager did not participate in the crafting of the statements in the press releases; did not participate in the creation of slides or statements presented at the analysts conference; and did not reach an agreement with any other person to make false, misleading, or deceptive statements or material omissions of fact. Defendant Yeager did not deny knowing about problems at Enron Broadband Services or writing emails discussing the problems with Enron Broadband Services and the Enron Intelligent Network (Instrument No. 774 and 775). Rather, Defendant Yeager presented a "good faith" defense through testimony that he believed in the business plan, believed the network operated properly, applied for a patent, and that he worked hard to make things

work. (Trial Tr. 9922-24, 9992-10001). Yeager also testified that he honestly believed in several positive statements of EBS employees concerning media cast, media transport, the network operating center, and the EBS business plan made at the ePowered Apps Conference on January 9-11, 2000. (Trial Tr. 10001 - 22). Yeager further testified that many of the internal conflicts with the project teams and SWAT teams had been resolved by the ePowered Conference. (Trial Tr. 10047-50). Defendant Yeager also presented the defense that he did not "*use*" material, nonpublic information, based on testimony that the trades were made by Yeager or his wife, in the course of normal investing and for purposes of diversification. (Trial Tr. 6256-57; 10174-80).

The focus of Defendant Yeager's testimony is reinforced by the arguments made by his defense counsel at trial. For example, in closing argument, Yeager's counsel argued (1) Yeager was merely present at the 2000 Analyst Conference and did not say anything except to answer one question (Trial Tr. 13365); (2) only a few of the dozens of witnesses who testified in the trial ever mentioned Yeager, and did not identify him as a participant in criminal activity (Trial Tr. 13371); (3) Yeager had "nothing to do" with the press releases and that it was Claudia Johnson who had responsibility for them (Trial Tr. 13384); (4) the government charged Defendants with alleged false statements about the Broadband Operating System in a video made by Shelby that was never actually played at the 2000 Analyst Conference (Trial Tr. 13374-75); (5) cooperation witness Ken Rice never said that he talked with Yeager about doing anything illegal or covering up problems at EBS (Trial Tr. at 13402); and (6) Yeager,

in good faith, believed in the EBS business plan and development of products (Trial Tr. 13393-94; 13404).

On several occasions, this Court made the determination that the government presented sufficient evidence to the jury to show that Defendant Yeager participated in the overall scheme to defraud charged in the Fifth Superseding Indictment. This is evidenced by the Court's denial of Defendant Yeager's numerous Rule 29 Motions for Judgment of Acquittal. However, the verdicts of acquittal on the conspiracy, securities fraud, and wire fraud counts show that the jury believed Defendant Yeager's testimony and that of other witnesses testifying in favor of Defendant Yeager on those counts.[30] In light of (1) the massive amount of circumstantial evidence presented by the government, and (2) the direct testimony of Defendant Yeager that he did not participate in the crafting of the message at the 2000 Analyst Conference, drafting of press releases, or agreement to defraud investors, the jury by choosing Yeager's

[30] The government argues that the jury could have believed the government's case, but acquitted Defendant Yeager based on erroneous grounds. In *United States v. Leach*, 632 F.2d 1337 (5th Cir. Unit A 1980), the Fifth Circuit recognized that "[t]he right of a jury to acquit for whatever reasons even though the evidence supports a conviction is an important part of the jury trial system guaranteed by the Constitution." *Id.* at 1341 n.12. The Fifth Circuit further noted, however, that if jury nullification is used as a basis on which the jury resolved an issue in favor of the defendant, the Court would be in effect abolishing the entire doctrine of collateral estoppel. *See Id.* (citation omitted); *see also Ashe*, 397 U.S. at 444 n.9. Thus, the Court need not consider the Government's argument that the jury could have acquitted Defendant Yeager based on erroneous grounds.

version of the events, necessarily determined that Yeager did not knowingly and willfully participate in the scheme to defraud described in the conspiracy, securities fraud, and wire fraud counts.

However, Defendant Yeager did not need to participate in an overall scheme to defraud in order for the jury to find that Yeager possessed or used material nonpublic information when he made trades of Enron stock. Defendant Yeager also did not deny proof of his possession of material, nonpublic information, but instead argued that he possessed a good faith belief in the EBS business model, technological capabilities, and positive statements that he and others made at the ePowered Apps Conference. As stated in the Instructions to the Jury, "[s]ince an essential element of the crime charged is intent to defraud, it follows that good faith on the part of a defendant is a complete defense to a charge of securities fraud, because such an honest or 'good faith' belief is inconsistent with a fraudulent intent." (Instrument No. 468, at 32). *See United States v. Paradies*, 98 F.3d 1266, 1285 (11th Cir. 1996); *United States v. Amlani*, 111 F.3d 705, 717 (9th Cir. 1997); Kenin F, O'Malley, Jay E. Grenig & Hon. Michael Daly Hawkins, FEDERAL JURY PRACTICE AND INSTRUCTIONS - CRIMINAL § 62.15 (5th ed. 2000).

Good faith operates as a valid and complete defense to both securities fraud and insider trading,[31] but does not serve as a defense to the

[31] *See* Jury Charge, Instrument No. 854 at 32, 45 (describing applicability of good faith defense to securities fraud, and applying all securities fraud instructions to insider trading).

crime of conspiracy or wire fraud. *See id.* If the jury necessarily acquitted Defendant Yeager based on the "good faith" defense, they would have had to acquit Yeager of insider trading as well. Because the jury did not acquit Defendant Yeager of both securities fraud and insider trading, but instead chose only to acquit Yeager of conspiracy, securities fraud, and wire fraud, the Court finds that the most realistic, rational and practical analysis of the verdicts is that the jury did not acquit Defendant Yeager based on the defense of "good faith." Rather, the Court finds that the jury necessarily determined that Defendant Yeager did not knowingly and wilfully participate or agree to participate in a scheme to defraud in connection with the alleged false statements or material omissions made at the analyst conference and press releases.

As stated previously, Yeager's defense, if believed by the jury, would not negate the government's evidence and contention that Yeager possessed and used material nonpublic information at the time he made trades of Enron stock. Yeager's defense would only establish that Defendant Yeager did not participate in the overall scheme to defraud. Accordingly, the Court finds that Defendant Yeager's acquittal on the conspiracy, securities fraud, and wire fraud counts of the Indictment does not completely bar the government from retrying Defendant Yeager on the charges of insider trading and money laundering.

IV.

In the alternative, Defendant Yeager seeks a suppression order prohibiting the government "from revisiting the factual issues decided by the first jury verdict . . . that (1) Yeager did not make, conspire to

make, or aid and abet false statements at the 2000 Analyst Conference, (2) Yeager did not participate in a conspiracy with the other defendants, (3) Yeager did not make, conspire to make, or aid and abet false statements in the press releases charged in Counts Three through Six, and (4) Yeager did not participate in the scheme to defraud described in Paragraphs 1 to 33 of the Indictment." (Instrument No. 885, at 19-20).

The Fifth Circuit has held that "even when a subsequent prosecution is not completely barred . . . collateral estoppel may bar the admission or argumentation of *facts* necessarily decided in the first trial." *Brackett*, 113 F.3d at 1400. The Court finds that the first three issues upon which Yeager seeks a preclusion order have merit. As stated previously, Defendant Yeager vigorously defended that he did not participate or take any part in the making of false statements at the 2000 Analyst Conference, false statements in press releases, or participate in the alleged conspiracy.

The jury's verdict of "not guilty" on all counts specifically dealing with the alleged conspiracy to commit securities fraud and wire fraud, and the substantive offenses of securities fraud and wire fraud clearly indicates that the jury "necessarily decided" that Defendant Yeager did not participate or agree to participate in a scheme to defraud in connection with alleged false statements and material omissions made at the 2000 Analyst Conference or in press releases. Thus, the Court finds that the government is precluded from introducing evidence or testimony that Defendant Yeager (1) made, conspired to make, or aided and abetted false statements at the 2000 Analyst

Conference, (2) participated in a conspiracy with the other defendants, or (3) made, conspired to make, or aided and abetted false statements in the press releases charged in Counts Three through Six.

The Court's finding that the government is precluded from introducing evidence that Yeager participated in a conspiracy or in wire or securities fraud, as outlined above, does not, however, preclude the presentation of evidence otherwise related to the insider trading counts. In other words, while the Court will limit the introduction of facts that the jury necessarily decided in its acquittal of the conspiracy, securities fraud and wire fraud counts, the doctrine of collateral estoppel does not prohibit the government from presenting relevant evidence which serves as the foundation of the crime charged therein to prove remaining counts, as long as such evidence otherwise comports with the Federal Rules of Evidence.

In *Dowling v. United States*, 493 U.S. 342 (1990), the Supreme Court held that "an acquittal in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Id.* at 349. Thus, the collateral estoppel doctrine "only bars relitigation of a previously rejected factual allegation where that fact is an ultimate issue in the subsequent case." *Wright v. Whitley*, 11 F.3d 542, 546 (5th Cir. 1994). However, "a general verdict of acquittal does not 'necessarily decide' an ultimate issue of fact but merely indicates that the evidence was not sufficient to prove every element of the offense beyond a reasonable doubt." *Brackett*, 113 F.3d at 1401; *see also id.* at 1401 n.9 (stating that "*Dowling* calls into question the line of

cases holding that collateral estoppel may bar the admission or argumentation of facts necessarily decided in the first trial, even if the subsequent prosecution is not completely barred.").

Although the jury in the first trial "necessarily determined" that the government failed to prove, beyond a reasonable doubt, that Yeager participated or agreed to participate in the scheme to defraud involving alleged false statements and material omissions made at the 2000 Analyst Conference and press releases, the government need not prove that fact beyond a reasonable doubt in the retrial of the insider trading counts, because it is not an ultimate issue. In order to convict Defendant Yeager for the crime of insider trading the government need only prove that (1) in connection with the purchase or sale of securities, the defendant employed a device, scheme, or artifice to defraud; (2) the defendant acted willfully, knowingly, and with the intent to defraud; (3) used, or caused to be used, any means or instrumentality of interstate commerce; and (4) used material, nonpublic information in his purchase or sale of Enron stock. (Jury Charge, at 41-43).

The ultimate issue in this case is the determination of whether Defendant Yeager used material nonpublic information when he traded Enron stock. "The admissibility of evidence relevant to an ultimate issue is governed by Fed. R. Evid. 401, which defines 'relevant evidence' as evidence 'having any tendency to make the existence or any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Brackett*, 113 F.3d at 1402. Evidence that statements were made at the Analyst Conference and in press releases that did

not comport with other information known to Defendant Yeager at the time of his trading activity is certainty relevant to the charges of insider trading. Thus, the government should be permitted to show in a retrial that Yeager was aware that public statements were made that did not comport with other internal information he was receiving at the time, because both are relevant to the insider trading charges. Accordingly, collateral estoppel does not bar the government from offering evidence originally offered in the first trial. The admissibility of that evidence is a purely evidentiary matter based on the relevance of that information.

As such, the government is not precluded from introducing evidence relevant to the insider trading counts or evidence otherwise admissible under the Federal Rules of Evidence, including statements made at the 2000 Analyst Conference, press releases charged in the Fifth Superseding Indictment, and factual allegations in Paragraphs 1-33 of the Fifth Superseding Indictment. However, the government is precluded from introducing evidence or testimony that Defendant Yeager (1) made, conspired to make, or aided and abetted false statements at the 2000 Analyst Conference, (2) participated in a conspiracy with the other defendants, or (3) made, conspired to make, or aided and abetted false statements in the press releases charged in Counts Three through Six.

V.

For the reasons set forth above, the Court finds that the doctrine of collateral estoppel does not bar the government from prosecuting Defendant Yeager on the insider trading and money laundering charges of the Eighth Superseding Indictment. As previously discussed, the government is precluded

from introducing evidence or testimony that Defendant Yeager (1) made, conspired to make, or aided and abetted false statements at the 2000 Analyst Conference, (2) participated in a conspiracy with the other defendants, or (3) made, conspired to make, or aided and abetted false statements in the press releases charged in Counts Three through Six. However, the government may introduce any evidence relevant to the insider trading and money laundering counts otherwise admissible under the Federal Rules of Evidence.

The Court further finds that the statute of limitations places no bar to a retrial of Defendant Yeager under charges set forth in the Eighth Superseding Indictment. "A superseding indictment filed while the initial indictment is pending is timely unless it broadens or substantially amends the charges made in the original indictment." *United States v. Schmick*, 904 F.2d 936, 940 (5th Cir. 1990). "[N]otice is the touchstone in deciding whether a superseding indictment substantially changes the original charges." *Id.* Thus, where "the allegations and charges are substantially the same in the old and new indictments, the assumption is that the defendant has been placed on notice of the charges against him," and the statute of limitations is tolled. *Id.*

In this case, the Court finds that the Eighth Superseding Indictment does not substantially amend the original indictment so as to render it untimely. The Fifth Superseding Indictment gave Defendant Yeager notice that he was to defend against charges of insider trading and money laundering, as well as conspiracy, securities fraud, and wire fraud. On the insider trading counts, the

Fifth Superseding Indictment generally charged Yeager with making trades of Enron Stock "while in possession of material non-public information regarding the technological capabilities, value, revenue and business performance of Enron Communications, Inc. and Enron Broadband Services." (Instrument No. 468). However, although the Eighth Superseding Indictment was amended to comport with the findings of the jury on the conspiracy, wire fraud and securities fraud counts, the Eighth Superseding Indictment neither adds new charges or renders Defendant Yeager susceptible to increased punishment. The factual allegations of the Eighth Superseding Indictment merely provide a more detailed description of the inside information that Defendant Yeager allegedly possessed at the time of his trades of Enron stock, but do not broaden or amend the Indictment so as to violate the statute of limitations. *See Schmick*, 904 F.2d at 941 ("Where the facts alleged have not been changed, although additional underlying details have been alleged, a superseding indictment brought outside the statute of limitations is timely.") Accordingly, Defendant Yeager's Motion to Dismiss the Eighth Superseding indictment on Fifth Amendment Collateral-Estoppel Grounds, or in the Alternative, on Statute-of-Limitations Grounds (Instrument No. 940), is DENIED.

VI.

Defendant Yeager's Motion to Dismiss Counts 27 through 46 and 67 through 165 on Fifth-Amendment Collateral-Estoppel Grounds (Instrument No. 885) is GRANTED in part and DENIED in part. Specifically, Defendant Yeager's Motion to completely bar the government from

retrying him of insider trading and money laundering is DENIED. Defendant Yeager's Motion to preclude the government from introducing certain evidence at trial is GRANTED in part as set forth herein.

Defendant Yeager's Motion to Dismiss the Eighth Superseding indictment on Fifth Amendment Collateral-Estoppel Grounds, or in the Alternative, on Statute-of-Limitations Grounds (Instrument No. 940) is DENIED.

At a subsequent trial of Yeager, the government is precluded from introducing evidence or testimony that Defendant Yeager (1) made, conspired to make, or aided and abetted false statements at the 2000 Analyst Conference, (2) participated in a conspiracy with the other defendants, or (3) made, conspired to make, or aided and abetted false statements in the press releases charged in Counts Three through Six. However, the government may introduce any evidence relevant to the insider trading and money laundering counts otherwise admissible under the Federal Rules of Evidence.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this 29th day of August, 2006, at Houston, Texas.

/s/
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA

v.

Criminal No.
H-03-93-03

KENNETH D. RICE
JOSEPH HIRKO
KEVIN SHANNON
KEVIN HOWARD
SCOTT YEAGER
REX SHELBY and
MICHAEL KRAUTZ

ORDER

Upon consideration of the Defendants' Joint Motion [#907] Memorandum for Leave to Interview Jurors, it is hereby,

ORDERED, that the Motion is
GRANTED
X DENIED

SIGNED this 19th day of December, 2005

/s/
Honorable Vanessa Gilmore
U.S. District Court Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

06-20321

UNITED STATES OF AMERICA
Plaintiff - Appellee
v.
SCOTT YEAGER
Defendant - Appellant

Consolidated with
06-20593

UNITED STATES OF AMERICA
Plaintiff - Appellee
v.
REX SHELBY
Defendant - Appellant

Consolidated with
06-20691

UNITED STATES OF AMERICA
Plaintiff - Appellee
v.
JOSEPH HIRKO
Defendant - Appellant

No. 06-20321

Appeals from the United States District Court for the Southern District of Texas

ON PETITIONS FOR REHEARING EN BANC

(Opinion March 17, 200B, 5 Cir., , F.3d)

Before HIGGINBOTHAM, GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:

(**X**) Treating the Petitions for Rehearing En Banc as a Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearings En Banc (FED. R. ApP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

( ) Treating the Petitions for Rehearing En Banc as a Petitions for Panel Rehearing, the Petitions for

Panel Rehearing are DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petitions for

Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ FORTUNATO P. BENAVIDES
United States Circuit Judge
REHG-6a

Filed: April 14, 2008

APPENDIX E

U.S. Constitution: Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

OPPOSITION BRIEF

OCT 15 2008

Nos. 08-40, 08-58 and 08-67

In the Supreme Court of the United States

JOSEPH HIRKO, PETITIONER

v.

UNITED STATES OF AMERICA

REX SHELBY, PETITIONER

v.

UNITED STATES OF AMERICA

F. SCOTT YEAGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

GREGORY G. GARRE
Solicitor General
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QUESTION PRESENTED

Whether, under the collateral estoppel component of the Double Jeopardy Clause, the jury's verdict that petitioners were not guilty on some counts bars the government from retrying petitioners on other counts on which the jury was unable to reach a verdict.

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In the Supreme Court of the United States

No. 08-40

JOSEPH HIRKO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 08-58

REX SHELBY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 08-67

F. SCOTT YEAGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 521 F.3d 367.[1] The opinion of the district

[1] Unless otherwise noted, all references to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 08-40.

court denying petitioner Hirko's motion to dismiss (Pet. App. 29a-59a) is reported at 447 F. Supp. 2d 734. The opinion of the district court denying petitioner Shelby's motion to dismiss (08-58 Pet. App. 29a-60a) is reported at 447 F. Supp. 2d 750. The opinion of the district court denying petitioner Yeager's motion to dismiss (08-67 Pet. App. 29a-66a) is reported at 446 F. Supp. 2d 719.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2008. A petition for rehearing was denied on April 14, 2008 (Pet. App. 60a-61a). The petition for a writ of certiorari in No. 08-40 was filed on July 8, 2008, and the petitions for a writ of certiorari in Nos. 08-58 and 08-67 were filed on July 14, 2008 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In November 2005, a grand jury sitting in the Southern District of Texas returned a seventh superseding indictment against petitioners Hirko and Shelby and an eighth superseding indictment against petitioner Yeager. Hirko was charged with conspiracy to commit wire fraud and securities fraud, in violation of 18 U.S.C. 371 (2000); securities fraud, in violation of 15 U.S.C. 78j(b) (2000), 15 U.S.C. 78ff (2000 & Supp. 2002), and 17 C.F.R. 240.10b-5; two counts of wire fraud, in violation of 18 U.S.C. 1343 (Supp. II 2002); and five counts of insider trading, in violation of 15 U.S.C. 78j(b) (2000), 15 U.S.C. 78ff (2000 & Supp. II 2002), and 17 C.F.R. 240.10b-5. Seventh Superseding Indictment paras. 23-29, 34-35. Shelby was charged with conspiracy to commit wire fraud and securities fraud, securities fraud, and four counts of insider trading. *Id.* paras. 23-27, 32-33. Yea-

ger was charged with five counts of insider trading and eight counts of money laundering in violation of 18 U.S.C. 1957 (2000). Eighth Superseding Indictment paras. 26-29. Petitioners moved to dismiss the bulk of those charges on the ground that the collateral estoppel component of the Fifth Amendment's Double Jeopardy Clause barred their prosecution. See Pet. App. 5a. The district court denied petitioners' motions. *Id.* at 29a-59a (Hirko); 08-58 Pet. App. 29a-60a (Shelby); 08-67 Pet. App. 29a-66a (Yeager). The court of appeals affirmed. Pet. App. 1a-28a.

1. Petitioners were executives at Enron Broadband Services (EBS), a unit of Enron Corporation engaged in the telecommunications business. In late 1998, EBS sought to develop an advanced "intelligent" communications network and the software necessary to run the network. According to the indictments, petitioners purposely sought to deceive the public and to drive up the price of Enron stock by making false statements about EBS's progress and financial condition. At the same time, the indictments allege, petitioners enriched themselves by selling millions of dollars of Enron stock. The indictments charge that petitioners made the false claims in press releases between 1999 and 2000 and at Enron's annual analyst conference in January 2000. Pet. App. 3a-4a; Gov't C.A. Br. 5-12.

2. In November 2004, a fifth superseding indictment charged petitioners with conspiracy to commit wire fraud and securities fraud, in violation of 18 U.S.C. 371 (2000) (Count 1); securities fraud, in violation of 15 U.S.C. 78j(b) (2000), 15 U.S.C. 78ff (2000 & Supp. II 2002), and 17 C.F.R. 240.10b-5 (Count 2); and four counts of wire fraud, in violation of 18 U.S.C. 1343 (Supp. II 2002) (Counts 3-6). In addition, each peti-

tioner was charged with insider trading under 15 U.S.C. 78j(b) (2000), 15 U.S.C. 78ff (2000 & Supp. II 2002), and 17 C.F.R. 240.10b-5: Hirko was charged with seven counts (Counts 23-26, 172-174), Shelby was charged with eight counts (Counts 47-54), and Yeager was charged with 20 counts (Counts 27-46). Each petitioner was also charged with money laundering under 18 U.S.C. 1957 (2000): Hirko was charged with 14 counts (Counts 55-66, 175-176), Shelby was charged with six counts (Counts 166-171), and Yeager was charged with 99 counts (Counts 67-165). Pet. App. 3a n.2; Gov't C.A. Br. 2-3.

After a trial in the United States District Court for the Southern District of Texas, the jury found petitioners not guilty on some counts but was unable to reach a verdict on the remaining counts. The jury found Hirko not guilty on two counts of insider trading (Counts 23-24) and 12 counts of money laundering (Counts 55-66). The jury found Shelby not guilty on four counts of insider trading (Counts 51-54). And the jury found Yeager not guilty on the conspiracy count (Count 1), the securities fraud count (Count 2), and the four counts of wire fraud (Counts 3-6). The jury was unable to reach a verdict on the other counts. The district court granted judgments of acquittal for Shelby on the four wire fraud counts (Counts 3-6) and on the six money laundering counts (Counts 166-171). The court declared a mistrial on the remaining counts. Pet. App. 4a; Gov't C.A. Br. 3-4.

3. Subsequently, in November 2005, the grand jury returned the seventh and eighth superseding indictments, which essentially deleted the counts on which petitioners were acquitted and re-alleged some, but not all, of the counts on which the jury had deadlocked. The first two counts of the seventh superseding indictment

charged Hirko and Shelby with conspiracy to commit wire and securities fraud as well as securities fraud, and those counts rested on essentially the same facts as Counts 1 and 2 of the fifth superseding indictment. The seventh superseding indictment also re-alleged against Hirko two of the wire fraud counts and five of the insider trading counts that had been charged in the fifth superseding indictment, and it charged Shelby with four insider trading counts that had been alleged in the fifth superseding indictment. Neither Hirko nor Shelby was charged with any money laundering counts. The eighth superseding indictment charged Yeager with five counts of insider trading and eight counts of money laundering, all of which had been alleged in the fifth superseding indictment. Pet. App. 4a-5a; Gov't C.A. Br. 4, 11-12.

4. Petitioners Hirko and Shelby moved to dismiss some of the counts charged in the seventh superseding indictment, and petitioner Yeager moved to dismiss all of the counts charged in the eighth superseding indictment. Petitioners claimed that the collateral estoppel component of the Double Jeopardy Clause barred further prosecution on those counts because, according to petitioners, facts essential to conviction on the counts had been resolved in their favor by the acquittals at the prior trial. The district court denied the motions. Pet. App. 4a-5a, 29a-59a; 08-58 Pet. App. 29a-60a; 08-67 Pet. App. 29a-66a.

a. Hirko moved to dismiss the securities fraud count, the two wire fraud counts, and two of the insider trading counts. Pet. App. 5a, 31a-34a.[2] He argued that the jury

[2] The two insider trading counts that Hirko moved to dismiss involved transactions that occurred in 2000. Hirko did not move to dismiss three other insider trading counts that involved transactions that

at the prior trial had necessarily found that he did not engage in the misrepresentations that formed the factual basis of those counts when it found him not guilty of the 12 money laundering and two other insider trading counts. *Id.* at 44a-45a; Gov't C.A. Br. 17.

The district court denied Hirko's motion. Pet. App. 29a-59a. The court concluded that the prior acquittals on the money laundering counts had no preclusive effect because, "[u]nder the circumstances of this case, the jury could have acquitted [Hirko] for any number of reasons," including that the funds that he allegedly laundered "were derived from the sale of stock that did not involve the proceeds of criminal activity." *Id.* at 45a. The court concluded that the prior acquittals on the insider trading counts likewise had no preclusive effect because the court could not determine "what particular issues the jury necessarily decided" when it found Hirko not guilty of those charges. *Id.* at 51a.

b. Shelby moved to dismiss the securities fraud count and the four insider trading counts. 08-58 Pet. App. 4a-5a, 31a-34a.[3] He argued that those counts were barred by collateral estoppel because the jury at the prior trial had necessarily decided that he did not act with the requisite intent to defraud when it found him not guilty on four other insider trading counts. *Id.* at 34a-35a, 43a.

The district court denied Shelby's motion. 08-58 Pet. App. 29a-60a. The court concluded that "the record contain[ed] no clear indication" that the jury's acquittals on

occurred in 2001. Hirko also did not move to dismiss the conspiracy count. Pet. App. 5a, 33a-34a.

[3] Like Hirko, Shelby did not move to dismiss the conspiracy count. 08-58 Pet. App. 4a-5a, 34a.

the insider trading counts at the prior trial were "based on a finding that [Shelby] lacked knowledge or an intent to defraud." *Id.* at 49a. "Rather," the court explained, "the jury could have found that the government failed to prove beyond a reasonable doubt that [Shelby] actually used material non-public information that he had in his possession at the time that he made [the] trades [involved in those counts], or that the government failed to establish that [he] employed or devised a scheme to defraud during that time period." *Ibid.* The court observed that the government's evidence that Shelby had acquired material, nonpublic information at the time he made the stock sales was stronger for the counts on which the jury had hung than for the counts on which it had found Shelby not guilty. *Id.* at 49-50a.

c. Yeager moved to dismiss the five insider trading counts and the eight money laundering counts. 08-67 Pet. App. 5a, 31a-36a. He argued that those counts were barred by collateral estoppel because the jury at the prior trial had necessarily found that he did not use material, nonpublic information in his sales of Enron stock when it found him not guilty on the conspiracy count, the securities fraud count, and the four wire fraud counts. *Id.* at 39a-40a, 49a-50a.

The district court denied Yeager's motion. 08-67 Pet. App. 29a-66a. The court concluded that the jury's not-guilty verdicts at the prior trial "necessarily determined that [Yeager] did not knowingly and wilfully participate or agree to participate in a scheme to defraud in connection with the alleged false statements or material omissions made at the analyst conference and press releases." *Id.* at 59a. The court stressed, however, that this determination did not "negate the government's evidence and contention that Yeager possessed and used

material nonpublic information at the time he made trades of Enron stock." *Ibid.* Because the government was not required to prove Yeager's participation in the scheme to defraud in order to establish his guilt on the insider trading counts, the court ruled that the prior acquittals did not collaterally estop the government from retrying Yeager on the insider trading and money laundering counts. *Id.* at 58a-59a, 62a.

5. The court of appeals affirmed. The court held that, on the facts of this case, the acquittals at the prior trial did not collaterally estop the government from retrying petitioners on any of the counts on which the jury was unable to reach a verdict. Pet. App. 1a-28a.

a. The court of appeals first concluded that Shelby failed to show that the jury, in finding him not guilty on four insider trading counts, had necessarily made a factual determination that would bar a retrial on the other four insider trading counts and the securities fraud count. Pet. App. 8a-13a. The court observed that the four insider trading acquittals at the prior trial involved sales of Enron stock during the summer of 2000, while the four insider trading counts on which the jury hung involved sales between January and March 2000. *Id.* at 8a. After an "extensive" examination of the record, *id.* at 9a, the court found that the acquittals could have been based on the jury's determination that Shelby "did not 'use' undisclosed, material information when he made the sales" during the summer of 2000 but instead made those sales because of discomfort with the stock market. *Ibid.* That determination, the court explained, would not bar a retrial on the insider trading counts involving sales between January and March, because it would not preclude a finding that Shelby made *those* trades because he possessed insider information. *Id.* at 9a-11a.

The court also concluded that the four insider trading acquittals did not bar a retrial on the securities fraud count because "'[u]sing' insider information in making trades is not an element of securities fraud." *Id.* at 12a.

b. The court concluded that Hirko likewise failed to show that the jury, in acquitting him on the 12 money laundering counts and two insider trading counts, necessarily made a factual determination that would bar a retrial on the securities fraud count, the two wire fraud counts and the other five insider trading counts. Pet. App. 15a-18a. The court rejected Hirko's argument that the jury must have found that he did not commit the latter offenses because they were the predicate offenses for the 12 money laundering counts on which the jury acquitted. *Ibid.* The court observed that the jury was instructed that it could find Hirko guilty of money laundering only if the government proved that he engaged in transactions with funds "derived from a specified unlawful activity," and the instructions defined "specified unlawful activity" as "wire fraud" and "fraud in the sale of securities" (including insider trading). *Id.* at 17a & n.17. The court concluded that, based on those instructions, the jury could have acquitted Hirko on the money laundering counts because it was unable to decide whether the government had proved that he had committed securities fraud, wire fraud, and insider trading. *Id.* at 17a-18a.

c. Finally, the court concluded that Yeager failed to show that the jury, in acquitting him on the conspiracy count, the securities fraud count, and the four wire fraud counts, necessarily made a factual determination that would bar a retrial on the five insider trading counts and eight money laundering counts. Pet. App. 18a-28a. Based on its review of the record, the court initially con-

cluded that "the jury could have acquitted Yeager of securities fraud for two reasons: (1) there were no material misrepresentations or omissions made at the [2000 annual analyst] conference; or (2) Yeager did not knowingly make misrepresentations or omissions because he believed the presentations were truthful." *Id.* at 21a. "Under either rationale," the court reasoned, "the jury must have found when it acquitted Yeager that Yeager himself did not have any insider information that contradicted what was presented to the public." *Ibid.* The court observed that, if one considered the acquittals in isolation, it would appear that the jury "made a finding that precludes the Government from now prosecuting him on insider trading and money laundering." *Id.* at 22a.

The court concluded, however, that its precedent required it also to consider the hung counts, along with the acquitted counts, in examining what the jury actually determined. Pet. App. 22a-24a (citing *United States* v. *Larkin*, 605 F.2d 1360, 1370 (5th Cir. 1979), modified on other grounds, 611 F.2d 585 (5th Cir.), cert. denied, 446 U.S. 939 (1980)). The court observed that, "if Yeager is correct that the jury found that he did not have insider information, then the jury, acting rationally, would have acquitted him of insider trading and money laundering." *Id.* at 24a. Because it did not, the jury's action produced a "discrepancy." *Ibid.* The court believed that there were at least four possible explanations for that discrepancy but that it was "impossible" to determine which was the actual explanation. *Id.* at 25a. For that reason, the court concluded that Yeager could not carry his burden to show what the jury necessarily determined and thus collateral estoppel did not bar a retrial. *Ibid.*

The court expressly rejected the government's argument, based on *United States* v. *Powell*, 469 U.S. 57 (1984), that collateral estoppel never applies when a jury has found a defendant not guilty on some counts but the jury has hung on other counts at the same trial. Pet. App. 25a-28a. The court agreed with decisions of other circuits that had rejected that argument. *Id.* at 26a-27a. The court stated, however, that it parted ways with those circuits to the extent that "they ignored the mistried counts after they determined that *Powell* did not apply." *Id.* at 27a.

ARGUMENT

Petitioners contend (08-40 Pet. 13-28; 08-58 Pet. 8-25; 08-67 Pet. 9-21) that collateral estoppel bars a retrial on the counts on which the jury was unable to reach a verdict at their first trial. They further contend (08-40 Pet. 16-23; 08-58 Pet. 12-16; 08-67 Pet. 12-17) that the circuits are in conflict on whether a court may consider the jury's failure to reach a verdict on one count in determining the basis for a jury's acquittal on another count. The court of appeals correctly concluded that collateral estoppel does not bar retrial of petitioners on the counts on which the jury hung at petitioners' first trial. Although there is tension among the decisions of the courts of appeals on the proper application of the doctrine of collateral estoppel in the context of a mixed verdict, this Court's review is not warranted in this case.

1. In *Ashe* v. *Swenson*, 397 U.S. 436 (1970), this Court held that the Double Jeopardy Clause of the Fifth Amendment "embodie[s]" the doctrine of collateral estoppel, or issue preclusion, which bars a prosecution that would require the relitigation of ultimate factual issues that were resolved against the government in an

earlier prosecution. *Id.* at 445; see *Schiro* v. *Farley*, 510 U.S. 222, 232 (1994). A jury's acquittal of a defendant on one charge precludes the government from proceeding against him on a second charge, however, only if the jury necessarily found a fact in the defendant's favor that is an essential element of the second charge (*i.e.*, a fact that the government must prove beyond a reasonable doubt). See *Ashe*, 397 U.S. at 443-445; *Dowling* v. *United States*, 493 U.S. 342, 347-348, 350-352 (1990). The defendant bears the burden of identifying the factual issue necessarily decided at the first trial that precludes a second trial. *Id.* at 350-351; see *Schiro*, 510 U.S. at 233.

a. In the government's view, the doctrine of collateral estoppel should never bar the government from retrying a defendant on a count on which a jury was unable to reach a verdict when the same jury acquitted him on another count. See Gov't C.A. Br. 21-32. There are two reasons for that conclusion.

First, this Court has held that a "retrial following a 'hung jury' does not violate the Double Jeopardy Clause." *Richardson* v. *United States*, 468 U.S. 317, 324 (1984). As the Court explained in *Richardson*, "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy," *id.* at 325, but "a mistrial following a hung jury is not an event that terminates the original jeopardy," *id.* at 326. It thus follows that, as this Court has observed in a slightly different context, "where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Ohio* v. *Johnson*, 467 U.S. 493, 500 n.9 (1984). In the mixed verdict con-

text, the government is forced to retry some charges only because they were not resolved by the jury when all the charges were pursued together. Accordingly, there is no reason to preclude the retrial.

Second, the rationale behind collateral estoppel does not apply when a jury renders a mixed verdict of acquittal on some counts and hangs on others at the same trial. That kind of mixed verdict has only two explanations, neither which supports application of collateral estoppel.

The jury may have found that the government failed to prove a fact that, although essential for conviction on the count on which the defendant was acquitted, was not essential for conviction on the count on which the jury deadlocked. Collateral estoppel would not be applicable in that context because an acquittal on one charge collaterally estops the government from prosecuting another charge only if the jury, in finding the defendant not guilty, necessarily decided some fact that the government must prove beyond a reasonable doubt in order to convict on the second charge. See *Ashe*, 397 U.S. at 443-445; *Dowling*, 493 U.S. at 347-348, 350-352.

Alternatively, the jury may have found that the government failed to prove a fact that was essential for conviction on both counts. Collateral estoppel would not be applicable in that circumstance because the jury's failure to acquit on the hung count would be inconsistent with its acquittal on the other count. This Court has recognized that "principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict are no longer useful" when a jury's verdicts are inconsistent. *United States* v. *Powell*, 469 U.S. 57, 68 (1984); see *Standefer* v. *United States*, 447 U.S. 10, 23 n.17 (1980) (inconsistency in jury verdicts "is reason, in

itself, for not giving preclusive effect to the acquittals"). When a jury has reached inconsistent verdicts, a defendant has no right to argue that the verdict of acquittal was "the one the jury 'really meant.'" *Powell*, 469 U.S. at 68. The same is true when the jury inconsistently acquits on one count and hangs on another. In that case, the presumption of rationality that underlies the doctrine of collateral estoppel does not apply.

b. Although the court of appeals rejected the argument that the doctrine of collateral estoppel should never bar a retrial of a defendant on a hung count based on an acquittal on another count by the same jury, Pet. App. 25a-27a, the court correctly concluded that collateral estoppel did not bar a retrial on the hung counts in this case.[4]

Contrary to petitioners' claims (08-40 Pet. 14-15, 24-28; 08-58 Pet. 16-18, 23-25; 08-67 Pet. 13, 19-21), assuming that collateral estoppel can ever apply in this context, the court of appeals was correct to consider the counts on which the jury deadlocked as well as the counts on which the jury acquitted in ascertaining what facts the jury necessarily found in petitioners' favor.[5] As

[4] Petitioners Hirko (08-40 Pet. 22-23) and Yeager (08-67 Pet. 19) contend that the analysis adopted by the court of appeals will in practice produce the same result as a categorical rule that collateral estoppel never applies in mixed verdict cases. That may be true. Nevertheless, the court of appeals expressly rejected a categorical rule and left open the possibility that collateral estoppel may apply in mixed verdict cases. Accordingly, it would be premature to conclude that the Fifth Circuit has adopted a categorical rule barring the application of collateral estoppel.

[5] The court of appeals explicitly applied that analysis only to petitioner Yeager's collateral estoppel claim. Pet. App. 22a-25a. The government agrees with petitioner Hirko (08-40 Pet. 2, 11, 14-15) that the

this Court explained in *Ashe*, to determine whether a defendant's prosecution is barred by the collateral estoppel component of the Double Jeopardy Clause, a court must "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." 397 U.S. at 444 (citation omitted). The court's "inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ibid.* (internal quotation marks and citation omitted). A jury's failure to reach a verdict on certain counts, while acquitting the defendant on other counts, is among the "relevant matter" that a court may con-

court's decision is most reasonably read to apply the same analysis to his collateral estoppel claim.

Contrary to petitioner Shelby's contention (08-58 Pet. 16-18), the court of appeals did not apply the same analysis in rejecting his collateral estoppel claim. Rather, the court held that Shelby failed to show that the jury, in finding him not guilty on four insider trading counts, necessarily made a factual determination in his favor that would bar a retrial on the other four insider trading counts and the securities fraud count. See Pet. App. 8a-14a. After an "extensive examination of the record," the court concluded that the acquittals were based on a finding of fact on an element that the government was not required to prove with respect to the hung counts, *i.e.*, that Shelby did not use insider information when he sold Enron stock in the summer of 2000. *Id.* at 9a-12a. Thus, Shelby's collateral estoppel claim amounts to a fact-bound dispute about whether the court of appeals properly read the record in this case. See 08-58 Pet. 23-25. That claim does not warrant this Court's review.

sider in determining what facts the jury necessarily found in the defendant's favor.[6]

There is no merit in petitioners Hirko and Shelby's claim that consideration of hung counts "turn[s] the protective function of the Double Jeopardy Clause on its head" by encouraging prosecutors to "overcharge" a case. 08-40 Pet. 26; see 08-58 Pet. 18-20. As this Court explained in *Schiro*, the Double Jeopardy Clause's protections against a second prosecution following an acquittal or conviction "stem from the underlying premise that a defendant should not be twice tried or punished for the same offense." 510 U.S. at 229. The Double Jeopardy Clause is thus not designed to limit the number of charges that prosecutors bring. Instead, its primary purpose is to "guard[] against * * * successive prosecutions." *Id.* at 230; see *Johnson*, 467 U.S. at 498-499. A retrial on a hung count is not a "successive" prosecution because, unlike a verdict of conviction or acquittal, "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which [a defendant] was subjected." *Richardson*, 468 U.S. at 326; see *Green* v. *United States*,

[6] Petitioner Shelby (08-58 Pet. 15) erroneously contends that the court of appeals' consideration of the hung counts conflicts with this Court's decision in *Schiro*, a capital case in which the defendant argued that the jury's failure to return a verdict on one count had collateral estoppel effect at the sentencing hearing. 510 U.S. at 232-236. In *Schiro*, the jury returned a verdict finding the defendant guilty on one out of three counts of murder, *id.* at 225-226, but the jury was not instructed to return verdicts on all of the counts. *Id.* at 233. "[S]ince it was not clear to the jury that it needed to consider each count independently," the Court declined to "draw any particular conclusion from its failure to return a verdict on Count I." *Id.* at 234. *Schiro* thus does not address the relevance to collateral estoppel analysis of a jury's inability to reach a verdict on a count that it was required to consider.

355 U.S. 184, 187-188 (1957). Indeed, giving collateral estoppel effect to a jury's acquittal on one count to bar a retrial on a hung count would undermine "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Richardson*, 468 U.S. at 324 (quoting *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978)); see *Wade* v. *Hunter*, 336 U.S. 684, 688-689 (1949).

The Fifth Circuit's analysis in this case is similar to the approaches taken by the First, Eighth, and District of Columbia Circuits. See *United States* v. *Howe*, 538 F.3d 820, 827-829 (8th Cir. 2008); *United States* v. *Aguilar-Aranceta*, 957 F.2d 18, 24-25 (1st Cir.), cert. denied, 506 U.S. 834 (1992); *United States* v. *White*, 936 F.2d 1326, 1328-1329 (D.C. Cir.), cert. denied, 502 U.S. 942 (1991). In each of those cases, the defendant was charged with multiple counts that involved a common issue. The jury acquitted the defendant on one count and deadlocked on another count. The court of appeals, taking into account both the jury's verdict of acquittal on one count and the jury's failure to reach a verdict on the other count, declined to hold that the verdict of acquittal rested on a finding in the defendant's favor on the common issue. The court instead reasoned that the verdict of acquittal could more rationally be explained as resting on the jury's finding on an issue that was not common to both counts. *Howe*, 538 F.3d at 828-829; *Aguilar-Aranceta*, 957 F.2d at 24-25; *White*, 936 F.2d at 1329. The court below followed essentially the same approach here.

2. Petitioners contend (08-40 Pet. 16-19, 22-23; 08-58 Pet. 12-16; 08-67 Pet. 12-17) that the decision below conflicts with decisions of the Sixth, Seventh, Ninth and Eleventh Circuits. Although there is tension between

the decisions of those circuits and the decision of the court of appeals in this case, this Court's review is not warranted at this time.

In *United States* v. *Frazier*, 880 F.2d 878, 885-886 (1989), cert. denied, 493 U.S. 1083 (1990), the Sixth Circuit applied collateral estoppel to bar retrial on a hung count based on a simultaneous acquittal on another count. The court rejected the government's argument that a jury's simultaneous acquittal and failure to reach a verdict amounted to the kind of inconsistency that would trigger the *Powell* rule that no factual finding in the defendant's favor can be deduced from inconsistent verdicts. *Id.* at 882-883.

In *United States* v. *Bailin*, 977 F.2d 270 (1992), the Seventh Circuit reached a similar result in a slightly different context. In that case, the jury was unable to reach a verdict on counts charging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, but it acquitted the defendant on other counts charging offenses that were also among the predicate acts in the RICO counts. The Seventh Circuit held that, although the government could retry the defendant on the RICO counts, the government could not base the RICO counts on predicate acts of which the defendant had been acquitted. *Bailin*, 977 F.2d at 275-283. In so holding, the court declined to apply the *Powell* rule, finding that "the jury's failure to reach a verdict [was] too inconclusive to qualify as inconsistent [with the acquittals] for the purposes of issue preclusion." *Id.* at 280 (internal quotation marks and citation omitted).

In *United States* v. *Romeo*, 114 F.3d 141 (1997), the Ninth Circuit held that the defendant's acquittal on a drug possession count barred his retrial on a drug im-

portation count on which the jury failed to reach a verdict. The court concluded that "a rational jury could [not] have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration," *i.e.*, that the defendant did not know that marijuana was in the trunk of the car that he drove from Mexico to the United States. *Id.* at 143 (citation omitted). The court declined to apply the *Powell* rule, observing that "[t]he inquiry under *Ashe* is what the jury actually decided when it reached its verdict, not on why the jury could not agree on the deadlocked count." *Id.* at 144.

There is tension between the decisions in *Frazier*, *Bailin*, and *Romeo* and the court of appeals' decision in this case, but there is no conflict. None of those decisions holds that a jury's failure to reach a verdict on one count is *always* irrelevant in determining what facts the jury necessarily found in acquitting the defendant on another count. Rather, those decisions merely found that, on the particular facts of those cases, the defendants had made out their collateral estoppel claims. Moreover, the court of appeals in this case made clear that it was *not* holding that the doctrine of collateral estoppel could *never* be applied to bar a retrial in the mixed verdict context. Pet. App. 25a-28a.[7]

[7] Petitioners Hirko (08-40 Pet. 23) and Yeager (08-67 Pet. 13) also rely on *United States* v. *Mespoulede*, 597 F.2d 329 (2d Cir. 1979). That case is inapposite, however, because it involved the application of collateral estoppel to bar the admission of evidence at a retrial, rather than to bar the retrial itself. Moreover, *Mespoulede* has been effectively overruled by this Court's decision in *Dowling*, which held that collateral estoppel does not bar the admission of evidence of a fact resolved in a defendant's favor at the first trial, provided that the government is not seeking to prove that fact beyond a reasonable doubt at the second trial.

More recently, the Eleventh Circuit held in *United States* v. *Ohayon*, 483 F.3d 1281, 1288-1291 (2008), that a jury's failure to reach a verdict on a hung count is not relevant to the determination whether the defendant has made out a collateral estoppel claim based on an acquittal on another count. The court held that the jury's acquittal on a charge of attempt to possess ecstasy with the intent to distribute it collaterally estopped the government from retrying the defendant on a charge of drug conspiracy, because the jury necessarily found that the defendant did not know that drugs were in the bag he received from a confidential informant. *Id.* at 1286-1287. In rejecting the government's argument that the partial mixed verdict showed that jury did not acquit on that basis, the court stated that "[a] partial verdict does not comprise two decisions that we must try to reconcile, because the mistried count is not a decision for which we can discern, or to which we can impute, a single, rational basis." *Id.* at 1289.

Although *Ohayon* appears to conflict with the decision in this case, this Court's review to resolve that apparent conflict would be premature at this time. It is possible that the Eleventh Circuit might reconsider its decision in *Ohayon* in light of the decision in this case. In *Ohayon*, the Eleventh Circuit declined to follow circuit precedent that is consistent with the decision in this case because the court concluded that the precedent was inconsistent with an earlier precedent, *United States* v. *Larkin*, 605 F.3d 1360 (5th Cir. 1979), modified on other grounds, 611 F.2d 585 (5th Cir.), cert. denied, 446 U.S.

Compare *Dowling*, 493 U.S. at 347-350, with *Mespoulede*, 597 F.2d at 334-335.

939 (1980).[8] See *Ohayon*, 483 F.3d at 1288-1289 (declining to follow *United States* v. *Quintero*, 165 F.3d 831 (11th Cir.), cert. denied, 528 U.S. 963 (1999), and *United States* v. *Bennett*, 836 F.2d 1314 (11th Cir.), cert. denied, 487 U.S. 1205 (1988)). But the Fifth Circuit's decision in this case makes clear that the Eleventh Circuit misread *Larkin*. As the court below explained, *Larkin* actually requires that a hung count be taken into account in determining the collateral estoppel effect of an acquittal. Pet. App. 23a-24a; see *Larkin*, 605 F.2d at 1370 ("No rational jury could have absolved Larkin of liability for Parker's crimes [on the vicarious liability counts] because of the absence of a conspiracy between the two, while it simultaneously failed to acquit Larkin on the conspiracy charge itself."). Accordingly, the Eleventh Circuit may be willing to re-examine its decision in *Ohayon* in an appropriate future case.[9]

3. a. This Court's review is also unwarranted at this time because the question presented arises relatively infrequently. We are aware of only two occasions other than this one in the last 20 years in which this Court has been asked to resolve the tension among the courts of appeals on the issue. The Court denied review in both of those cases. See *Quintero* v. *United States*, 528 U.S. 963 (1999) (No. 99-39); *White* v. *United States*, 502 U.S. 942

[8] In *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (1981) (en banc), the Eleventh Circuit adopted as binding precedent decisions of the former Fifth Circuit rendered before October 1, 1981.

[9] As petitioner Hirko notes (08-40 Pet. 23-24), the government filed a petition for rehearing en banc in *Ohayon*. The Eleventh Circuit's issuance of its decision on April 12, 2007, and denial of the government's petition on August 7, 2007, occurred before the court of appeals decided this case on March 17, 2008.

(1991) (No. 91-516). The Court should do the same here.[10]

b. Indeed, review would be particularly inappropriate in this case because collateral estoppel would not bar petitioners' retrials even if petitioners were correct that the hung counts could not be considered. Even if only the acquittals are considered, none of the petitioners can show that the jury necessarily found a fact in his favor that is an essential element of the counts on which the jury deadlocked.

Contrary to petitioner Hirko's claim (08-40 Pet. 4-7), he cannot show that the jury's acquittals on the 12 money laundering counts necessarily rested on a finding that he did not commit the predicate acts alleged in the securities fraud count, two wire fraud counts, and two insider trading counts on which the jury deadlocked. As the government argued in the court of appeals, the indictment and jury instructions could rationally have led the jury to believe that it had to convict Hirko on *all* of the predicate securities, wire fraud, and insider trading counts in order to convict him on the money laundering counts. The indictment and the jury instructions both defined "specified unlawful activity" for purposes of the money laundering charges as "wire fraud * * * *and* fraud in the sale of securities." Fifth Superseding Indictment para. 52; Pet. App. 17a n.17 (emphasis added). And neither the court nor the parties ever

[10] The issue has also arisen in a few other cases in which the petitioner did not raise a conflict claim. See, *e.g.*, *Aguilar-Aranceta* v. *United States*, 506 U.S. 834 (1992) (No. 91-7995); *Ashley Transfer & Storage Co.* v. *United States*, 490 U.S. 1035 (1989) (No. 88-1305); *Campbell* v. *United States*, 488 U.S. 993 (1988) (No. 88-479); *Bennett* v. *United States*, 487 U.S. 1205 (1988) (No. 87-1751). The Court denied review in those cases as well.

expressly explained to the jury that the funds that Hirko was alleged to have laundered need not be derived from *both* of those offenses. Accordingly, the jury may have felt compelled to acquit Hirko on the money laundering counts once it decided to acquit him on two of the predicate insider trading counts that generated some of the funds that he allegedly laundered. See Gov't C.A. Br. 44-50.

Similarly, Shelby cannot show that the jury, in acquitting him on four insider trading counts, necessarily made a factual determination that would bar a retrial on the other four insider trading counts and the securities fraud count. See Pet. App. 7a-14a; Gov't C.A. Br. 38-43. Indeed, as discussed above, the court of appeals held that a retrial on the hung counts was not barred because the jury's acquittals were based on a finding of fact on an element that the government was not required to prove to establish Shelby's guilt on the hung counts, *i.e.*, that Shelby did not use insider information when he sold Enron stock in the summer of 2000. Pet. App. 9a-12a; see note 6, *supra*.

Finally, Yeager cannot show that the jury, in acquitting him on the conspiracy count, the securities fraud count, and the four wire fraud counts, necessarily made a factual determination that would bar his retrial on the five insider trading counts and eight money laundering counts. Although the court of appeals believed that "the jury must have found when it acquitted Yeager that Yeager himself did not have any insider information," Pet. App. 21a, the record does not support that conclusion. Instead, as the government argued in the court of appeals, the jury's acquittals on the conspiracy and fraud counts could have rested on the conclusion that Yeager did not participate in the failure to disclose the

true state of EBS's business or that he lacked the requisite intent to defraud when those misrepresentations or omissions occurred. Those conclusions would not preclude a finding that Yeager possessed insider information and used it to trade in Enron stock. See Gov't C.A. Br. 32-38. Indeed, as the district court found, Yeager "did not deny proof of his possession of material, nonpublic information." 08-67 Pet. App. 58a. Thus, the jury's acquittals do not bar a retrial on the five insider trading counts and eight money laundering counts on which the jury deadlocked.

Because petitioners cannot show that the jury necessarily found facts in their favor that would bar a retrial on the hung counts even if only the acquittals are considered, petitioners' claims involve only fact-bound applications of the doctrine of collateral estoppel. Further review of those claims by this Court is not warranted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2008

REPLY BRIEF

Supreme Court, U.S.
FILED
OCT 24 2008
OFFICE OF THE CLERK

No. 08-67

In the Supreme Court of the United States

F. SCOTT YEAGER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

A. The "Tension" Among Appellate Courts Recognized by the Government Is in Fact a Deep Split That Requires Resolution By This Court.

There is deep division among the circuits about whether the acquittal of a defendant on some counts can ever bar his retrial on counts on which the same jury failed to reach a verdict. In the proceedings below, the Fifth Circuit panel found that its opinion "parted ways" with other circuits that have held that the presence of hung counts is legally irrelevant to the collateral estoppel analysis. App. 27a.

The government refuses to recognize the conflict between decisions of the Sixth, Seventh, and Ninth Circuits and the decision in this case, choosing instead to label it a "tension." Gov't Opp. at 17-19 (citing *United States* v. *Romeo*, 114 F.3d 141 (9th Cir. 1997); *United States* v. *Bailin*, 977 F.2d 270 (7th Cir. 1992); *United States* v. *Frazier*, 880 F.2d 878, 885-86 (6th Cir. 1989)). It admits that a decision of the Eleventh Circuit conflicts with the case below. Gov't Opp. at 20 (citing *United States* v. *Ohayon*, 483 F.3d 1281, 1288-91 (11th Cir. 2007)).

In finding a "tension" but no conflict among the Circuit opinions on this issue, the government argues that none of the decisions holds that hung counts are always irrelevant for collateral estoppel purposes. Gov't Opp. at 19. But even the government admits that "it may be true" that the practical effect of the Fifth Circuit's holding will produce the same result as a categorical rule that

collateral estoppel never applies in mixed verdict cases. Gov't Opp. at n. 4.

In fact, the Sixth, Seventh, Ninth, and Eleventh Circuit decisions conflict with the opinion below because, after rejecting the Government's argument that *United States* v. *Powell*, 469 U.S. 57 (1984), should apply to a mixed verdict of acquittals and hung counts, those courts "ignored the mistried counts." App. 27a. In this case, however, the panel concluded that Fifth Circuit precedent required it to weigh the mistried counts, even though it agreed that *Powell* did not apply in this case. *Id.* There is therefore a direct conflict between the decision below and the Sixth, Seventh, Ninth, and Eleventh Circuits as to whether hung counts should be weighed as part of a collateral-estoppel analysis.[1]

B. Review is Also Warranted Because the Petition Presents an Important Question of Law, and Resolution in Yeager's Favor Would Bar His Retrial.

The government also argues that review is unwarranted because "the question presented arises relatively infrequently." Gov't Opp. at 21. While it may be true that the question in this petition has not been brought to this Court often, that is more the result of the realities of criminal practice than a reflection of the importance of the issue, which has

[1] The Government speculates that the Eleventh Circuit may reconsider *Ohayon* in light of the decision below. Gov't Opp. at 20. But while the Eleventh Circuit is bound by precedent occurring before the reorganization of the Fifth Circuit, it gives no special weight to post-reorganization decisions of that court.

concerned trial courts for many years and has already been considered by eight of the Circuits.

When a jury fails to resolve some counts but acquits on other counts, the government may decide not to retry the defendant. Alternatively, the remaining hung counts may be resolved through a settlement or guilty plea. But even if the situation presented in this petition rarely finds its way to this Court, the Court's resolution of this question will have a significant effect on the ability of prosecutors to retry hung counts, and, therefore, on charging decisions.[2]

Moreover, contrary to the government's assertion, if the issues presented in this petition are resolved in Yeager's favor, his retrial on the remaining charges against him will be barred. The court below, after a thorough *de novo* review of the record, found that "the jury must have found when it acquitted Yeager that Yeager himself did not have any insider information." App. 21a. Yeager carried his burden to demonstrate what essential element of the remaining charges was necessarily decided in his favor by the jury, but the Fifth Circuit found that the mere presence of the hung counts prevented the application of collateral estoppel. A ruling from this Court that collateral estoppel can apply to hung counts would prevent Yeager from being placed in

[2] *Richardson v. United States*, 468 U.S. 317, 324 (1984), cited by the government, did not resolve the question presented by this petition. In *Richardson*, the court held that a defendant may be retried on a hung count, without considering whether an acquittal on one count may bar his retrial on a different hung count.

jeopardy for a second time on the insider trading and money laundering counts of the indictment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

103

(2) (2) (2)

Nos. 08-40, 08-58, 08-67

FILED

AUG 0 8 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

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REX SHELBY

Petitioner,

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Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND CRIMINAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND CRIMINAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of more than 12,500 attorneys and more than 35,000 affiliate members from all 50 States. NACDL is the only national professional bar association that represents public defenders, private criminal defense lawyers, and law professors. Founded in 1958, NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs in this Court and other courts throughout the country.

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[1] In accordance with Supreme Court Rules 37.2 and 37.6, counsel for *amici* represent as follows: None of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. This brief was authored in its entirety by counsel for *amici*. The parties received timely notice of *amici*'s intent to file this brief and gave their consent. Letters of consent have been filed with the Clerk.

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SUMMARY OF ARGUMENT

The doctrine of collateral estoppel is "embodied in the Fifth Amendment guarantee against double jeopardy" and applies fully in criminal cases. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970). The doctrine acts to prevent the government from prosecuting a defendant for a crime that requires proof of a fact that was "actually and necessarily decided in the defendant's favor" by an earlier jury's verdict of acquittal. *Schiro v. Farley*, 510 U.S. 222, 236 (1994). In its decision below, the Fifth Circuit, "part[ing] ways with [its] sister circuits," wrongly held that a jury's failure to return a verdict on one count of a multi-count indictment can be "weighed" against the jury's judgment of acquittal on a factually overlapping charge in a way that fatally undermines the collateral-estoppel consequences of that acquittal. App. 27a. The Fifth Circuit's decision aggravates an already deep and entrenched circuit split on the "weighing" issue and, significantly, creates a rule that effectively abolishes the collateral-estoppel doctrine in increasingly common multi-count prosecutions that result in partial verdicts.

Collateral estoppel is an essential component of the Double Jeopardy Clause and is firmly rooted in the Clause's history and tradition. The doctrine works hand-in-hand with the Clause both to protect final judgments and to prevent successive prosecutions. The Fifth Circuit's decision is in the teeth of these two core constitutional policies.

First, by "weighing" mistried counts in the collateral-estoppel calculus, the decision will invariably lead to the unconstitutional disregard of juries' final judgments

of acquittal, thus destroying the "special weight" that acquittals have historically been given in the double-jeopardy analysis. That is because "weighing" a jury's failure to reach a decision on a factually overlapping charge a failure that means absolutely nothing for double-jeopardy purposes will by definition create uncertainty that will prevent a defendant from carrying his burden of proving that an issue of ultimate fact was *actually and necessarily* decided in his favor by his earlier acquittal. Indeed, the Fifth Circuit's decision itself makes this point. In rejecting Yeager's assertion that collateral estoppel barred his retrial, the court unsurprisingly found *after* "consider[ing] the hung counts along with the acquittals"—"a potential inconsistency, making it impossible for [it] to decide with any certainty what the jury necessarily determined." App. 22a. But to reach this decision, the court had to disregard Yeager's acquittals, which themselves indicated "that Yeager is correct that collateral estoppel bars a retrial." *Id.* The Fifth Circuit's "weighing," therefore, is tantamount to a *per se* no-estoppel rule.

Second, the Fifth Circuit's decision creates a gaping hole in the Double Jeopardy Clause's protections against successive prosecutions. By allowing a jury's failure to reach a verdict on one count to trump an acquittal in a partial-verdict case, the decision perversely incentivizes the government to charge as many overlapping counts as possible and to do so precisely so that it can avoid the collateral-estoppel consequences of that acquittal. That is because, under the Fifth Circuit's approach, when a jury acquits a defendant on some counts but hangs on another with a related element, the government is free to retool its case against the defendant on the mistried count in a future prosecution even where the acquittals,

when "consider[ed] ... by themselves," would estop the prosecution of the mistried count. App. 22a. The Fifth Circuit's decision thus rewards prosecutors for overcharging their cases and then failing to prove the superfluous charges. That result turns the Double Jeopardy Clause on its head.

ARGUMENT

These cases present a question of vital importance to the criminal justice system: Whether, consistent with the Double Jeopardy Clause, a jury's failure to reach a decision on one count of a multi-count indictment (here, the "hung" or "mistried" count) can be "weighed" against an acquittal on a factually related count in a manner that diminishes the acquittal's collateral-estoppel effect for future prosecutions. The petitioners have already detailed the deep and entrenched circuit split that exists on that question. *See* Hirko Pet. 16-24; Yeager Pet. 12-22; Shelby Pet. 9-16. Briefly, the First, Fifth, and D.C. Circuits have held that weighing mistried counts against acquitted counts is permissible under the Double Jeopardy Clause; the Sixth, Seventh, Ninth, and Eleventh Circuits have held that such weighing violates that Clause's collateral-estoppel component. And, indeed, in the decision below, the Fifth Circuit candidly acknowledged that by "weigh[ing] hung counts in applying collateral estoppel" it was "part[ing] ways with [its] sister circuits." App. 22a, 27a. The existence of the split, therefore — which is reason enough to grant certiorari — is well-established, and there is no point in replowing that ground here.

This brief seeks, instead, to emphasize two additional points: first, that the doctrine of collateral estoppel

has historically played, and continues to play, an important role in promoting the fundamental purposes of the Double Jeopardy Clause; and second, that the Fifth Circuit's rationale in this case would eviscerate the collateral-estoppel doctrine as it applies to an increasingly large swath of criminal cases, particularly in this age of overlapping federal offenses that provide multiple means of imposing criminal liability for the same underlying conduct.

I. The Collateral-Estoppel Doctrine Is Part and Parcel Of The Double Jeopardy Clause.

A. *Ashe v. Swenson* Established The Applicability Of Collateral Estoppel As A Rule Of Constitutional Criminal Procedure.

The doctrine of collateral estoppel operates as "an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). Collateral-estoppel issues arise most often, of course, in civil litigation between private parties. Importantly, however, this Court in *Ashe* recognized that collateral-estoppel principles are "embodied in the Fifth Amendment guarantee against double jeopardy" and apply with full force in criminal cases. *Id.* at 445.

As a rule of constitutional criminal procedure, collateral estoppel operates to prevent the government from prosecuting a defendant for a crime that requires proof

of a fact previously decided in the defendant's favor by an earlier jury's verdict of acquittal. The critical question that controls the doctrine's application is whether the particular fact was indeed "actually and necessarily decided" for the defendant as part of the earlier acquittal. *Schiro v. Farley*, 510 U.S. 222, 236 (1994). If it was, then the government is barred collaterally estopped by the Double Jeopardy Clause from re-prosecuting.

Collateral-estoppel doctrine, this Court said in *Ashe*, "is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe*, 397 U.S. at 444. A court's review, in other words, "'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Id.* (internal citation omitted). In particular, in deciding for "constitutional collateral estoppel" purposes whether a fact was "actually and necessarily decided" in the defendant's favor, *Schiro*, 510 U.S. at 232, 236, "a court [must] 'examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Ashe*, 397 U.S. at 444 (internal citation omitted). The point of the pragmatism is clear: "Any test more technically restrictive would ... simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Id.*

By preventing the relitigation of a controlling fact once it has necessarily been determined, *Ashe* plays a crucial role in ensuring the core protections of the Dou-

ble Jeopardy Clause. But, to be clear, *Ashe* hardly gives criminal defendants a free pass. Under *Ashe*, it is the acquitted defendant not the government—who bears the burden of proof. In particular, in order to invoke collateral estoppel to prevent successive prosecution on a factually overlapping charge, the defendant must demonstrate that a fact necessary to the government's case was "actually and necessarily decided" in his favor as part of his earlier acquittal. *Schiro*, 510 U.S. at 236; *accord Dowling v. United States*, 493 U.S. 342, 350-51 (1990) (same). *Ashe*, therefore, erects a high bar, which significantly limits collateral estoppel's real-world operation. *See Dowling*, 493 U.S. at 358 (Brennan, J., dissenting).

Petitioners Hirko, Yeager, and Shelby would seem to fall squarely within the narrow-but-essential protection of *Ashe*: Each defendant staked his case on one controlling issue, and each defendant's acquittal indicates that the jury must have "actually and necessarily decided" that issue in the defendant's favor. Hirko's case is illustrative. Hirko was charged (as relevant here) with securities fraud, wire fraud, and money laundering stemming from those underlying frauds. Hirko contested but a single element of the Government's money-laundering charge and "stipulated to the other elements." App. 16a-17a. Hirko's targeted defense: that his conduct did not involve "criminally derived" funds, 18 U.S.C. § 1957, because he did not commit the acts of wire and securities fraud on which the money-laundering charges were predicated. App. 16a-17a. In acquitting Hirko of money laundering, the jury *must* have decided that he did not commit the underlying frauds. Those frauds, therefore, cannot be relitigated in any future prosecution. *See Dowling*, 493 U.S. at 350; *Ashe*, 397

U.S. at 443.[3] The same basic analysis applies to Yeager (Pet. 4-6) and Shelby (Pet. 5-8). Under a straightforward application of controlling precedent, then, the Government's attempt here to institute new charges that require, in part, a different determination by a second jury of facts previously established in the petitioners' favor should be barred.

The Fifth Circuit reached a contrary conclusion based on logic that, if credited, would eviscerate the collateral-estoppel doctrine and *Ashe* in a whole host of multi-count prosecutions. In performing its *Ashe* analysis, rather than focusing on the jury's actual decisions the acquittals the Fifth Circuit gave controlling weight to the jury's *failure to reach a decision* on factually related counts charged in the petitioners' first trial. In doing so, the Fifth Circuit exacerbated an already deep and entrenched circuit split—and, far worse, created what amounts to a partial-verdict loophole in the collateral-estoppel doctrine, a loophole that, as we explain in Part II, undermines the very principles that the Double Jeopardy Clause was designed to protect.

[3] Hirko is clearly correct that the only reasonable reading of the Fifth Circuit's opinion (as it relates to him) is that the court treated the jury's failure to reach a decision on the predicate frauds as reason to disregard the clear import of Hirko's money-laundering acquittals. *See* Hirko Pet. 28. If the Fifth Circuit intended the literal meaning of what it said, at least in part—that the jury "had to acquit" Hirko on the money-laundering counts "[s]ince it could not determine whether Hirko committed" the predicate frauds (App. 18a)—then its decision is so manifestly wrong as to warrant summary reversal. It is hard to imagine a principle more basic than that a jury that *cannot decide* whether a criminal defendant committed a charged act must hang, not acquit. Indecision leads to a mistrial, not an exoneration. *See, e.g., United States v. Gotti*, 451 F.3d 133, 137 (2d Cir. 2006); Fed. R. Crim. P. 31(b)(3).

B. The Collateral-Estoppel Doctrine Is Firmly Rooted In The Double Jeopardy Clause's History And Tradition.

The Double Jeopardy Clause states that no person "shall ... be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Clause has deep roots in British common law and, in particular, in the common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon. As Blackstone noted, "the plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." 4 William Blackstone, *Commentaries* 335, *quoted in Green v. United States*, 355 U.S. 184, 187 (1957).

The Clause's history demonstrates that a primary purpose of double-jeopardy protection at common law was to prevent multiple prosecutions arising out of the same conduct. Concerns about successive prosecutions, in turn, arose from the twin beliefs that final factual determinations should be respected and that prosecutors should not get multiple opportunities to convict. *See* Anne B. Poulin, *The Limits of Double Jeopardy: A Course Into The Dark?* 39 Vill. L. Rev. 627, 639 (1994) ("The original purpose of double jeopardy protection and its predecessors was to preserve the finality of judgments."); *id.* at 633-34 ("Double jeopardy protects the defendant's interest in freedom from multiple trials and multiple punishments ...."). As we explain below, the Fifth Circuit's decision here violates not one but both of these common-law commitments.

The collateral-estoppel doctrine, as applied in criminal cases, shares the same basic pedigree. It is closely linked to the history and traditions that underlie the Double Jeopardy Clause itself. Writing for the Court nearly a century ago, Justice Holmes emphasized that connection in *United States v. Oppenheimer*: "[T]he 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice in order, when a man once has been acquitted on the merits, to enable to government to prosecute him a second time." 242 U.S. 85, 88 (1916) (internal citation omitted). Some years later, in *Ashe*, this Court made even more explicit the historical relationship between the Double Jeopardy Clause and collateral estoppel. *See* 397 U.S. at 446 n.10. (explaining how collateral estoppel "became a safeguard firmly embedded in federal law"); *see also* Anne B. Poulin, *Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal*, 58 U. Cin. L. Rev. 1, 12 (1989) ("If the first proceeding ends in acquittal, of course, collateral estoppel comes into play as well as basic double jeopardy protection.").

The linkage should come as no surprise. It fits hand-in-glove with the rise of the modern criminal code. Protections against double jeopardy developed at a time when crimes were creatures of the court-crafted common law and when legislatures played virtually no role in their definition. *See* Anne B. Poulin, *Double Jeopardy Protection from Successive Prosecutions: A Proposed Approach*, 92 Geo. L.J. 1183, 1200 (2004). In those days, there were far fewer crimes, and courts defined the elements of those crimes very clearly and very simply. As this Court has explained that era, "at common law, and under early federal criminal statutes, offense categories were relatively few and distinct." *Ashe*, 397 U.S. at 446

n.10. Accordingly, as an historical matter, *autrefois acquit* provided sufficient protection to the accused because "[a] single course of criminal conduct was likely to yield but a single offense." *Id.*

The evolution of complex criminal codes, however, brought about a sea change. As legislatures began establishing crimes and assigning elements, they often used detailed, technical language that was not always consistent from one provision to another. *See* Poulin, *supra*, 92 Geo. L.J. at 1200. Not surprisingly, "[a]s the number of statutory offenses multiplied, the potential for unfair and abusive reprosecutions became far more pronounced." *Ashe*, 397 U.S. at 446 n.10. That was because "with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Id.*

It was as a result of this dramatic shift—from the relative simplicity of the common law to the complexity of the modern code that "federal courts soon recognized the need to prevent such abuses through the doctrine of collateral estoppel, and it became a safeguard firmly embedded in federal law." *Id.* Meticulously tracing the history, and echoing Justice Holmes' opinion in *Oppenheimer*, this Court in *Ashe* reiterated that the principles of fundamental fairness (and systemic efficiency) that underlie civil collateral estoppel must apply with equal force in the criminal context and, more particularly, that those principles are part and parcel of the Double Jeopardy Clause. *See id.* at 445.

II. The Fifth Circuit's Decision Eviscerates The Collateral-Estoppel Doctrine In Multi-Count Prosecutions That Result In Partial Verdicts.

Double-jeopardy protections against multiple prosecutions address two fundamental concerns in our legal system. First, the Double Jeopardy Clause is specifically designed to safeguard final judgments. *See, e.g.*, *United States v. Scott*, 437 U.S. 82, 92 (1978) ("[T]he primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment."). Second, and relatedly, the Clause ensures that an acquitted defendant is not subjected to a do-over in which the prosecutor hopes to refine his case or strike a more favorable jury. *See, e.g.*, *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("'[T]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.'" (quoting *Burks v. United States*, 437 U.S. 1, 11 (1978)). Collateral estoppel, as applied by this Court in *Ashe*, addresses the very same two concerns. *See Crist v. Bretz*, 437 U.S. 28, 33 (1978) ("A primary purpose" served by the Double Jeopardy Clause is "akin to that served by the doctrines of res judicata and collateral estoppel—to preserve the finality of judgments."); *Ashe*, 397 U.S. at 446 (Collateral estoppel "protects a man who has been acquitted from having to 'run the gantlet' a second time.") (internal citation omitted).

The Fifth Circuit's decision below ignores—and worse, actually undermines both of these double-jeopardy/collateral-estoppel principles. First, by "weighing" mistried counts in the collateral-estoppel analysis, the decision eliminates the special significance that has traditionally been accorded acquittals. And second, by

allowing a mistried count to trump an acquittal in a partial-verdict scenario, the decision incentivizes prosecutors to overcharge criminal defendants as a means of paving the way for a retrial in the event that the jury acquits on some counts but hangs on others.

A. The Fifth Circuit's Decision Undermines The Integrity Of Final Judgments And The Special Significance Given To Acquittals.

This Court's double-jeopardy decisions make one principle absolutely clear: An acquittal is a constitutionally significant event that is "accorded special weight" in the Fifth Amendment analysis. *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980); *Tibbs*, 457 U.S. at 41 (same); *accord Poland v. Arizona*, 476 U.S. 147, 156 (1986) ("'[T]he law attaches particular significance to an acquittal.'" (quoting *Scott*, 437 U.S. at 91 (1978)). "'The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal,' for the 'public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'" *DiFrancesco*, 449 U.S. at 129 (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)). Put slightly differently, "[i]f the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." *Arizona v. Washington*, 434 U.S. 497, 503 (1978).

The Fifth Circuit's decision ignores altogether—and, as we will show, flips on its head the "special weight" given to acquittals. In its *Ashe* analysis, the Fifth Circuit "part[ed] ways with [its] sister circuits" and concluded

that it was bound to "weigh hung counts" in assessing the collateral-estoppel effect of an acquittal. App. 22a, 27a. It did so even though it is well established that a hung, or mistried, count means *precisely nothing* for double-jeopardy purposes. Unlike an acquittal, which says something specific and concrete—namely, that the jury has unanimously concluded that the defendant is not guilty of the charged offense—a mistrial is a constitutional non-event. *See Richardson v. United States*, 468 U.S. 317, 325 (1984) (noting that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy" and that "the failure of the jury to reach a verdict is not an event which terminates jeopardy").

The Fifth Circuit's analysis wrongly "presumes that a mistried count, like an acquitted count, is a decision for which we can discern, or to which we can impute, a single basis." *United States v. Ohayon*, 483 F.3d 1281, 1289 (11th Cir. 2007) (Pryor, J.). It is not. "[T]he failure of a jury to reach a verdict is not a decision; it is a failure to reach a decision." *Id.* Partial verdicts cannot be reconciled for the simple reason that "the mistried count is not a decision for which we can discern, or to which we can impute, a single, rational basis. The very essence of a mistried count is that the jury failed to reach agreement." *Id.*; *see also United States v. Romeo*, 114 F.3d 141, 144 (9th Cir. 1997) ("Because there are so many variable factors which can cause a jury not to reach a verdict, we will not speculate on why the jury could not agree. The inquiry under *Ashe* is what the jury actually decided when it reached its verdict, not ... why the jury could not agree on the deadlocked count.").

Because a mistried count is a double-jeopardy non-event, it cannot be "weighed" or otherwise used to devalue, let alone trump, a jury's final, and conclusive, judgment of acquittal. The Fifth Circuit's contrary conclusion cannot be reconciled with the acknowledged purpose of the Double Jeopardy Clause and its component collateral-estoppel doctrine to safeguard acquittals.

The wrongheadedness of the Fifth Circuit's approach is magnified once it is realized that the practice of "weighing" mistried counts against an acquittal to determine the acquittal's collateral-estoppel effect will, in actuality, result in a *per se* no-estoppel rule for partial verdicts. The reason lies in the stringent showing that an acquitted defendant must make in order to avail himself of the collateral-estoppel doctrine namely, that an issue of ultimate fact was *actually and necessarily decided* in his favor in the course of the earlier acquittal. If a mistried count on a charge with a factually overlapping element can be considered, or "weighed," in the collateral-estoppel calculus, then it will, by definition, create uncertainty regarding the jury's verdict of acquittal, thereby preventing the acquitted defendant from establishing what the jury necessarily decided when it acquitted him. *See Ohayon*, 483 F.3d at 1289 (recognizing that "the search for the basis of a mistried count will necessarily be in vain"). Accordingly, *every* time a hung count is considered in determining the collateral-estoppel consequences of a defendant's acquittal of a crime that shares one or more factually related elements, the hung count will act to preclude the defendant from getting the benefit of his acquittal.

That problem is exacerbated because a defendant has no practical way of peeking behind the jury's verdict

to determine, in actuality, why the jury acquitted him on one count while failing to reach a decision on another factually related count. A defendant typically cannot obtain and admit evidence concerning the jury's deliberations in order to establish why the jury hung or to discern what the jurors' failure to decide may or may not mean. *See* Fed. R. Evid. 606(b). Indeed, "[c]ourts have always resisted inquiring into a jury's thought processes" on the ground that "this deference to the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *United States v. Powell*, 469 U.S. 57, 67 (1984). Without the practical ability to discover and use evidence necessary to understand definitively a jury's decision to acquit on one charge and to hang on another, a defendant's already-difficult burden under *Ashe* becomes insurmountable.

The Fifth Circuit's decision itself actually makes our point that "weighing" mistried counts will invariably lead to the unconstitutional disregard of a defendant's acquittal. Consider Yeager's case. In rejecting Yeager's assertion that collateral estoppel barred his retrial, the court unsurprisingly found only *after* "consider[ing] the hung counts along with the acquittals" "a potential inconsistency, making it impossible for [it] to decide with any certainty what the jury necessarily determined." App. 22a. To reach this decision, however, the court had to disregard the acknowledged fact that Yeager's acquittals, when "consider[ed] ... by themselves," indicated "that Yeager is correct that collateral estoppel bars a retrial." *Id.*

The Fifth Circuit's decision is thus squarely at odds with the Double Jeopardy Clause's core purpose of pro-

tecting final judgments. This Court should grant certiorari to make clear, as the majority of the courts to consider the question have held, that mistried counts are irrelevant to the application of collateral estoppel in criminal cases. Absent this Court's intervention, the Fifth Circuit (along with the First and D.C. Circuits) will continue to rely on mistried counts double jeopardy non-events to undermine conclusive judgments of acquittal and their "special weight" under the Double Jeopardy Clause. *DiFrancesco*, 449 U.S. at 129; *Tibbs*, 457 U.S. at 41 (same); *accord Poland*, 476 U.S. at 156 ("'particular significance'" (quoting *Scott*, 437 U.S. at 91)).

B. The Fifth Circuit's Decision Will Encourage Overcharging And Facilitate Successive Prosecutions.

The Fifth Circuit's decision simultaneously undermines the Double Jeopardy Clause's second core function the protection against successive prosecutions. The decision all but ensures that criminal defendants will increasingly face compound, multi-count indictments and (what is worse) exposes them to the very real possibility of successive prosecutions for factually related crimes arising out of the same underlying conduct. By creating a rule in which a simultaneously charged hung count can trump a factually related acquitted count—thereby paving the way for a retrial the Fifth Circuit's decision perversely incentivizes prosecutors to charge as many overlapping counts as possible. The reason is simple: Overcharging gives the government the best chance of evading the collateral-estoppel consequences of in effect, insuring against an acquittal. Where, as here, a jury acquits a defendant on one count but for some un-

known and unknowable reason hangs on a count with a related element, the government is free, under the Fifth Circuit's rationale, to wipe the slate clean, retry the mistried count, and, for that matter, bring any other charge that otherwise would have been barred by *Ashe*. And *why not* "lard[] the indictment with multiple offenses based on the same conduct"? Hirko Pet. 26. There is, from a prosecutor's strategic perspective, absolutely nothing to lose and absolutely everything to gain.

Think, again, about Hirko's case. It is undisputed that Hirko contested only one element of the money-laundering charges brought against him: He denied committing the underlying acts of wire and securities fraud that the Government relied on to show that his conduct involved "criminally derived" funds under the money-laundering statute. App. 16a. Hirko, of course, was acquitted on the money-laundering counts. The only rational way to understand the acquittals is as resting on a factual finding that Hirko did not commit the underlying frauds. In other words, "consider[ing] the acquittals by themselves" (App. 22a) shows that the jury unanimously concluded that the Government failed to prove that Hirko committed the predicate frauds.

It is therefore common ground that if Hirko had been charged in this case with money laundering *only*, the Double Jeopardy Clause (by way of collateral estoppel) would preclude the Government from later trying Hirko for the predicate frauds. *See Powell*, 469 U.S. at 64. But under the Fifth Circuit's rationale, everything changes and the collateral-estoppel bar vanishes—simply because the Government charged the predicate frauds alongside money laundering and because, for whatever reason, the jury hung on the fraud counts. The

inequity of that situation is patent, and the incentives it creates are perverse.

Jettisoning collateral estoppel in partial-verdict cases, as the Fifth Circuit has done, creates a gaping hole in the fundamental constitutional protections against successive prosecutions. *See Schiro*, 510 U.S. at 230. Because the Fifth Circuit's rule allows "a second jury to reconsider the very issue upon which the defendant has prevailed," it "implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause." *United States v. Mespoulede*, 597 F.2d 329, 337 (2d Cir. 1979). Casting aside this core protective function of the Clause, the Fifth Circuit has created a system with little to "prevent[] the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction." *Tibbs*, 457 U.S. at 41. This greatly increases the risk of "[r]epeated prosecutorial sallies [that] unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance." *Id.*

The practical threat posed by the Fifth Circuit's decision is very real. Legislatures are creating new and often complex criminal offenses every day. The federal criminal law, in particular, continues to experience explosive growth. *See* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Legal Memorandum 26 (June 16, 2008), *available at* www.heritage.org/research/legalissues/lm26.cfm (cataloguing approximately 4,450 federal crimes and noting that Congress continues to adopt new crimes at a rate of about 57 per year). This continuing proliferation of

criminal statutes permits prosecutors to charge numerous overlapping offenses to cover a single course of criminal conduct. *See, e.g., United States v. Bailin*, 977 F.2d 270, 277 (7th Cir. 1992) ("Prosecutors have the discretion to charge a defendant who is accused of a rather limited criminal act with numerous separate crimes. But because the technical elements necessary to establish these different crimes often differ, the defendant who is acquitted on only some counts may receive no formal double jeopardy protection."). Prosecutors therefore clearly have the *opportunity* to skirt double-jeopardy protections by filing bloated multi-count indictments. And the Fifth Circuit's stingy view of collateral estoppel gives prosecutors the *incentive* to do just that. It leads to precisely the sort of agglomeration of prosecutorial power that led this Court in *Ashe* to reiterate the centrality of collateral estoppel to double-jeopardy doctrine. *See Ashe*, 397 U.S. at 446 n.10.

The Fifth Circuit's decision in this case discards core protections for acquitted defendants in exchange for a system that rewards prosecutors for overcharging their cases and then failing to prove the superfluous charges. This Court should step in to ensure that double-jeopardy principles are not so easily evaded.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions for certiorari.

Respectfully submitted,

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August 8, 2008

JOINT APPENDIX

FILED
JAN 12 2009
OFFICE OF THE CLERK

No. 08-67

In the

Supreme Court of the United States

F. SCOTT YEAGER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed July 14, 2008
Certiorari Granted November 14, 2008

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RELEVANT DOCKET ENTRIES

United States v. Scott Yeager, No. 4:03cr00093-6
(United States District Court for the
Southern District of Texas)

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04/29/2003	16	SEALED SUPERSEDING INDICTMENT
05/03/2003	41	ORDER granting motion SEALED for Post-Indictment Restraining Order
09/15/2003	113	SECOND SUPERSEDING INDICTMENT
11/13/2003	178	SUPERSEDING INDICTMENT
11/25/2003	150	SECOND APPLICATION by United States for post-indictment restraining order
12/23/2003	176	SECOND POST-INDICTMENT RESTRAINING ORDER: Court states that May 1st restraining order shall remain in force under the same terms applicable to the properties being restrained in this order, along with the items stated in detail in this order
04/15/2004	241	MOTION with Memorandum in Support by Scott Yeager for Bill of Particulars
05/21/2004	271	RESPONSE by United States in opposition to Defts' Motions for

		Bill of Particulars and Severance: motion to sever counts, or in the alternative, to dismiss count 217, motion to sever defendant and counts, motion to sever defendant and count, motion for severance, motion for Bill of Particulars, motion for severance due to improper and prejudicial joinder, motion to sever, motion to dismiss count one and for severance due to improper and prejudicial joinder, motion to dismiss count one, motion to sever under rule 8(b) or rule 14, motion to sever count 218 under rule 8 or rule 14, motion to sever
06/03/2004	284	ORDER denying motion to sever as to Scott Yeager and denying motion for Bill of Particulars as to Scott Yeager
07/22/2004	340	FOURTH SUPERSEDING INDICTMENT
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09/02/2005	885	MOTION to Dismiss Count(s) 27 through 46 and 67 through 165 of the Fifth-Amendment Collateral-Estoppel Grounds by Scott Yeager
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02/02/2006	976	REPLY TO RESPONSE to Motion re MOTION to Dismiss the Eighth Superseding Indictment
04/07/2006	1033	ORDER granting in part and denying in part Motion to Dismiss Counts as to Scott Yeager (6); denying Motion to Dismiss as to Scott Yeager
04/10/2006	1034	NOTICE OF APPEAL
08/29/2006	1241	AMENDED ORDER as to Scott

		Yeager. Motion to Dismiss the Eighth Superseding indictment on Fifth Amendment Collateral-Estoppel Grounds or in the Alternative, on Status of Limitations Grounds is DENIED. Deft. Yeager's Motion to Dismiss Courts 27 through 46; 67 through 165 on Fifth Amendment Collateral-Estoppel Grounds is GRANTED in part and DENIED in part. Deft. Yeager's Motion to completely bar the government from retrying him of insider trading and money laudering is DENIED. Deft Yeager's Motion to preclude the government from introducing certain evidence at trial is GRANTED in part
04/25/2008	1391	Judgment of USCA for the Fifth Circuit
04/25/2008	1392	Opinion of USCA for the Fifth Circuit
07/01/2008	1418	MOTION to Dismiss Count(s) 1-5 of the Eighth Superseding Indictment
07/01/2008	1436	MOTION for Bill of Particulars with Legal Points and Authorities in Support Thereof
07/08/2008	1460	ORDER denying Motion for Bill of Particulars

RELEVANT DOCKET ENTRIES

United States v. Scott Yeager, No. 06-20321
(United States Court of Appeals
for the Fifth Circuit)

DATE	DOCKET ENTRY
07/08/2006	Appellant's Brief and Record Excerpts
12/22/2006	Appellee's Brief
01/23/2007	Reply Brief
08/06/2007	Oral Argument
03/17/2008	Opinion
03/31/2008	Petition for Rehearing En Banc
04/14/2008	Order Denying Petition for Rehearing En Banc

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	Cr. No. H-03-93-05
v.	§	
	§	Violations: 15 U.S.C. §§
JOSEPH HIRKO,	§	78j(b) and 78ff; 17 C.F.R.
KEVIN HOWARD,	§	§ 240.10b-5 (Securities
SCOTT YEAGER,	§	Fraud); 18 U.S.C. §§ 1343
REX SHELBY,	§	(Wire Fraud); 371
and MICHAEL	§	(Conspiracy); 2 (Aiding
KRAUTZ	§	and Abetting); 1957
	§	(Money Laundering);
	§	981 and 982 (Asset
		Forfeiture); 28 U.S.C.
		§ 2461 (Asset Forfeiture).

FIFTH SUPERSEDING INDICTMENT

The Grand Jury charges:

INTRODUCTION

1. At all times relevant to this Fifth Superseding Indictment, Enron Corp. ("Enron") was a publicly traded Oregon corporation with its headquarters in Houston, Texas. Among other businesses, Enron was engaged in the purchase and sale of natural gas, construction and ownership of pipelines and power facilities, provision of telecommunication services, and trading in contracts to buy and sell various commodities. Before it filed for bankruptcy on December 2, 2001, Enron was the seventh largest corporation in the United States.

2. Enron was a publicly traded company whose shares were listed on the New York Stock Exchange. As a public company, Enron was required to comply with regulations of the United States Securities and Exchange Commission ("SEC"). Those regulations protect members of the investing public by, among other things, ensuring that a company's financial information is accurately recorded and disclosed to the public.

3. Prior to 1997, Enron was not involved in the telecommunications business. On July 1, 1997, Enron acquired a public utility, Portland General Corporation, based in Portland, Oregon. As part of that acquisition, Enron acquired Portland General's telecommunications division, FirstPoint Communications, Inc. ("FirstPoint"). In 1998, Enron changed the name of FirstPoint to Enron Communications, Inc. ("ECI") and expanded the business. In approximately January 2000, ECI was renamed Enron Broadband Services (ECI and EBS will collectively be referred to herein as "EBS"). At all times relevant to this Fifth Superseding Indictment, EBS was a wholly owned subsidiary of Enron engaged in the telecommunications business.

Defendants and Others

4. Defendant JOSEPH HIRKO is a resident of Portland, Oregon. HIRKO was President and CEO of EBS from approximately July 1, 1998 to July 28, 2000. HIRKO shared CEO responsibilities with Kenneth Rice from approximately July 16, 1999 to July 28, 2000. HIRKO served as a consultant to EBS regarding potential mergers and acquisitions from December 2000 to February 2001.

5. Defendant KEVIN HOWARD is a resident of Houston, Texas. HOWARD was Vice President of Finance at EBS from approximately August 1, 1999 to September 2001.

6. Defendant SCOTT YEAGER is a resident of Sugarland, Texas. YEAGER became Senior Vice President of Strategic Development at EBS on approximately October 1, 1998. His employment at EBS was terminated on approximately August 1, 2001.

7. Defendant REX SHELBY is a resident of Houston, Texas. SHELBY became Senior Vice President of Engineering Operations at EBS on approximately December 9, 1998. His employment at Enron was terminated on approximately November 15, 2001.

8. Defendant MICHAEL KRAUTZ is a resident of Houston, Texas. KRAUTZ was Senior Director of Transactional Accounting at EBS from approximately August 16, 1999 to October 3, 2001.

9. Kenneth Rice is a resident of Houston, Texas. Rice was Chairman and Chief Executive Officer ("CEO") of EBS from approximately July 16, 1999 to approximately July 13, 2001. Rice shared CEO responsibilities with JOSEPH HIRKO from approximately July 16, 1999 to July 28, 2000. Rice also served as Chief Commercial Officer of EBS from approximately February 14, 2000 to July 28, 2000.

10. Kevin Hannon is a resident of Houston, Texas. Hannon was Chief Operating Officer ("COO") of EBS from approximately January 27, 2000 to June 2001.

THE SCHEMES TO DEFRAUD

Summary of the Schemes

11. From at least April 1999 until May 14, 2001, defendants JOSEPH HIRKO, KEVIN HOWARD, SCOTT YEAGER, REX SHELBY, and MICHAEL KRAUTZ, together with Kenneth Rice, Kevin Hannon and others, engaged in conduct and made false and misleading statements and omitted material information from statements made, all of which were designed to and did deceive the investing public and others about the technological capabilities, value, revenue and business performance of EBS. The defendants executed this scheme by, among other means: (i) causing Enron to issue materially false and misleading press releases; (ii) making and causing others to make materially false and misleading statements to equity analysts and others; (iii) using fraudulent means to generate revenue so that EBS and Enron could appear to reach publicly declared financial targets; and (iv) failing to disclose material adverse information about EBS's poor business performance. During this same time period, defendants HIRKO, YEAGER, and SHELBY sold large quantities of Enron stock, generating millions of dollars for themselves.

Proposal to Build the Enron Intelligent Network

12. In late 1998, defendant SCOTT YEAGER proposed that Enron build an advanced, software-driven "intelligent" telecommunications network. Defendant JOSEPH HIRKO backed this proposal. To implement this plan, EBS acquired Modulus, a small software company run by, among others, defendant REX SHELBY. SHELBY was tasked with turning Modulus' messaging software,

called InterAgent, into complex "intelligent" network control software capable of running a nationwide telecommunications network with advanced features, such as automated billing and user-defined and controlled quality of service.

False Statements: Press Releases

13. On April 19, 1999, defendants HIRKO, YEAGER and SHELBY issued and caused to be issued the first of many materially false and misleading press releases. The press release announced that the Enron Intelligent Network was tested, "lit," or operational, and ready to deliver two products, a media streaming product and a media transport product. The press release stated that a software control layer powered by InterAgent was embedded on Enron's network and the networks of Enron's distribution partners. The press release stated that the InterAgent software provided built-in "intelligence" that allowed Enron to route data efficiently and reliably and provide usage-based metering and billing, bandwidth scheduling, and user-defined quality of service, or "QOS," to the desktop. All of these claims were false and misleading. Among other false claims, only a small part of the network was lit, the two media products were not functional, and the claimed network control software did not exist.

14. During the remainder of 1999, defendants HIRKO, YEAGER and SHELBY, together with Rice, issued and caused to be issued numerous additional press releases containing false claims about the Enron network similar to those set forth in paragraph 13 above. At various times during 1999 and early 2000, numerous EBS executives and employees told HIRKO, YEAGER,

SHELBY and Rice that, among other things, the Enron network was not intelligent and Enron's press releases and marketing materials were false and misleading. Despite these warnings, and other negative information about EBS, HIRKO, YEAGER, SHELBY, and Rice failed to correct past false statements and continued to issue new false statements.

15. In the summer of 1999, Enron announced that EBS would become a "core" Enron business and a major part of Enron's overall business strategy. In early November 1999, Enron senior management, HIRKO and Rice decided to make EBS the centerpiece of Enron's annual presentation to equity analysts, scheduled for January 20, 2000.

The January 20, 2000 Analyst Conference

16. Between late October 1999 and January 2000, defendants HIRKO, YEAGER, SHELBY, HOWARD, together with Rice, and others attended meetings and participated in conference calls to prepare a PowerPoint and video presentation about EBS for Enron's upcoming analyst conference. In these meetings, YEAGER, HIRKO, SHELBY, Rice, and others decided to rename Enron's network control software, which was still in very early planning stages, the "Broadband Operating System," or "BOS." Early drafts of the PowerPoint presentation clearly stated that the BOS and related network control software was under development and would not be deployed and operational until a future date. During December 1999 and January 2000, these "forward-looking" statements were progressively deleted from the PowerPoint presentation.

17. On January 20, 2000, Enron made EBS the major focus of its annual equity analyst conference in Houston, Texas. During the presentation, which defendant YEAGER also attended, defendants HIRKO and SHELBY, together with Rice and others made numerous false and misleading statements about EBS's fiber network, proprietary software and technical capabilities. Among other things, HIRKO, SHELBY and others claimed that EBS possessed advanced network control software that made Enron superior to its competitors by allowing Enron to control quality of service all the way to the customer's desktop and to bill customers only for the amount of bandwidth capacity they actually used rather than at a flat billing rate. As part of this effort, SHELBY made a video presentation about the BOS in which he claimed that the BOS software was built and controlling the network, providing quality of service control and other features. These claims, along with other statements made by HIRKO, SHELBY and others during the presentation, were false and misleading. As HIRKO, SHELBY, YEAGER, and Rice knew, Enron did not have any proprietary network control or BOS software on its commercial network; Enron's network did not possess most of the advanced capabilities claimed during the presentation; the only portion of the BOS project actually in existence was in development in a software lab; and most of the software specifications that would be required before the BOS software could be written and deployed had not yet even been defined.

18. The Enron presentation was received favorably by analysts and investors. On January 20,

2000, the day of the presentation, the share price of Enron stock increased from approximately $54 to $67. The following day, the stock rose above $72.

Continued False Statements

19. Following the analyst conference, between approximately January 31, 2000 and July 19, 2000, defendants HIRKO, YEAGER, SHELBY, together with Rice, Hannon, and others continued to cause the issuance of materially false and misleading press releases. These press releases falsely stated that intelligent software or an intelligent operating system, typically referred to by name as the BOS, was embedded on the Enron network and provided quality of service control and other features. In fact, the BOS remained in the specification drafting phase. Enron had no proprietary control software deployed on its network, and Enron had no software that could control quality of service.

The Blockbuster Agreement

20. On April 5, 2000, EBS signed a 20-year exclusive agreement with Blockbuster Inc. ("Blockbuster"), the nation's largest video rental company, to stream movies to customers' homes. Under the agreement, Blockbuster was responsible for obtaining digital rights to film content from studios and other sources. EBS was responsible for encoding the movies and streaming them over its telecommunications network to customers' homes. This business was known as "video on demand," or "VOD," because the customers were supposed to be able to access and watch movies in their homes whenever they wanted. To obtain this contract, EBS employees misled Blockbuster employees about the

capabilities of the Enron network. Enron announced the deal on July 19, 2000, issuing a press release that was false and misleading in numerous respects.

21. The VOD service never got beyond the testing stage, as EBS never developed a cost-effective way to stream movies to customers' homes, and Blockbuster and EBS never obtained sufficient quantities of premium content to distribute over the system. As a result, the EBS/Blockbuster relationship never generated any recurring revenue for EBS.

Origins of Project Braveheart

22. Enron's Chief Operating Officer projected at the January 2000 analyst conference that EBS would lose approximately $60 million during 2000. On October 9, 2000, defendant HOWARD, as well as Rice, Hannon, and others were informed that EBS – which had failed to generate any significant recurring revenues during 2000 – would lose approximately $118 million in the fourth quarter of 2000 alone. As a result, HOWARD, together with Rice and Hannon, knew that absent a large infusion of revenue before year end, EBS would miss its previously announced target by a wide margin.

23. In approximately fall of 2000, defendant HOWARD ordered Enron employees who reported to him to examine the Blockbuster agreement to see if there was any way Enron could derive accelerated earnings for the fourth quarter of 2000. The structured finance transaction that resulted was known at EBS by the code name "Project Braveheart" and was designed to allow EBS to "monetize" the Blockbuster agreement. The

monetization first involved calculating the net present value of the VOD business, based upon its estimated future earnings, and then creating a joint venture that would allow EBS to sell those future earnings to a third party as a financial asset. EBS would then recognize the gain from this sale as revenue immediately at the time of the monetization, rather than gradually over the life of the agreement. Though EBS initially planned to recognize a small amount of the proceeds as revenue in 2000, Hannon ordered that the size of the transaction be increased over the course of the fourth quarter of 2000, as defendant HOWARD and others learned that EBS would potentially miss its earnings target by an increasing amount.

Structure of the Braveheart Transaction

24. In order to complete the Braveheart transaction, EBS created a joint venture with two investors: nCube, a small VOD technology company based in Beaverton, Oregon; and "Thunderbird," an investment vehicle owned by an Enron-controlled investment fund called "Whitewing." nCube and Thunderbird purportedly combined to contribute 3% of the equity of the joint venture, which was called EBS Content Systems LLC. The joint venture was purposely "deconsolidated" from Enron's books so that the results of its operations would not be reflected on Enron's financial statements. EBS subsequently assigned the Blockbuster contract to the joint venture. EBS then sold a portion of its interest in the joint venture for approximately $115 million to an investment structure called "Hawaii 125-0," which previously had been created and funded by the Canadian Imperial Bank of Commerce ("CIBC"). Enron recognized approximately $111

million of the $115 million it received from CIBC as revenue in the fourth quarter of 2000 and the first quarter of 2001.

Accounting Requirements for the Braveheart Transaction

25. Under relevant accounting rules, Enron could recognize earnings from the Braveheart transaction only if, among other things, three basic accounting requirements were met: (i) EBS did not control the joint venture; (ii) nCube and Thunderbird made at-risk equity investments in the joint venture, and these investments remained at risk for the duration of the joint venture; and (iii) the Hawaii 125-0 trust's capital structure included at least a 3% at-risk equity investment. Defendants HOWARD and KRAUTZ were aware of and understood these requirements. If these requirements were not met, the proceeds Enron received from CIBC should have been reported as debt, not revenue.

Violation of Accounting Requirements

26. Defendants HOWARD, KRAUTZ and others intentionally violated these accounting requirements in order to complete the transaction and record $111 million in revenue for Enron. Among other things, HOWARD, KRAUTZ, and others (i) selected nCube as a joint venture partner because they knew that nCube would and did allow EBS to control the joint venture; (ii) promised nCube that it could sell its interest in the joint venture to EBS or an EBS designee in early 2001 and would receive, at that time, its investment plus a fixed return; and (iii) "sold" an interest in the joint venture to CIBC even though HOWARD and others

knew that Enron had promised CIBC that it would not lose money on its Hawaii 125-0 transactions.

27. Defendants HOWARD, KRAUTZ and others also intentionally deceived Arthur Andersen accountants working on the transaction by failing to disclose, among other things, that the Braveheart transaction deliberately had been structured in a way that violated applicable accounting requirements. As HOWARD and KRAUTZ knew, had all of the facts about the transaction been disclosed, Enron would not have been able to report any of the $111 million as revenue.

Impact of the Braveheart Transaction

28. In the fourth quarter of 2000, $53 million of EBS's reported $63 million in revenue came from Braveheart, while in the first quarter of 2001, $58 million of EBS's $85 million in reported revenue was from the transaction. On January 22, 2001, Enron's Chief Operating Officer announced to equity analysts on a conference call that EBS had met its $60 million loss target. Absent the fraudulent Braveheart revenues, EBS would have missed its publicly stated target for the year 2000 by more than $50 million. Similarly, in the first quarter of 2001, EBS would have missed its quarterly target but for the revenues from the fraudulent Braveheart transaction. Enron reported the revenues from the Braveheart transaction on its publicly filed SEC form 10-K for 2000 and SEC form 10-Q for the first quarter of 2001.

The January 25, 2001 Analyst Conference

29. Between approximately October 2000 and January 22, 2001, Rice and Hannon were repeatedly informed that EBS was performing very

poorly; EBS had made little commercial progress during 2000; EBS's network operations should be shut down or sold; and EBS had an unsupportable cost structure. This information was provided by senior executives, independent business consultants, and in weekly management summaries setting forth EBS's projected losses. On January 22, 2001, Rice and Hannon were informed that every business unit at EBS was losing money and that EBS currently estimated that it would lose more than $149 million in the first quarter of 2001.

30. In December 2000, Rice and Hannon also became aware that Blockbuster was threatening to terminate the EBS-Blockbuster VOD agreement because, among other things, EBS had failed to meet its contractual commitment to sign distribution agreements with each regional Bell operating company by December 2000. In order to prevent termination, which would threaten the Braveheart transaction, EBS negotiated an extension with Blockbuster in which both parties agreed not to terminate the agreement before March 2001. The agreement was subsequently terminated in March 2001.

31. In January 2001, Rice and Hannon held a series of meetings to plan the EBS presentation for Enron's upcoming annual equity analyst conference, scheduled for January 25, 2001. During these meetings, Rice and Hannon, among other things, reviewed estimates of EBS's value. During one meeting, Rice and Hannon reviewed a model showing the value of EBS's content distribution business as $8 billion, a sharp decline from the $18 billion estimate presented at the 2000 analyst conference. After Rice stated that he would not

allow EBS to present a number lower than the prior year, the number was inflated to $21 billion.

32. On January 25, 2001, Rice and Hannon made a presentation about EBS at Enron's annual equity analyst conference. In the EBS presentation, Rice stated, among other things, that EBS's strategy was right on target; EBS's content delivery business had an outstanding year; Blockbuster was EBS's "anchor tenant" with a 20-year deal; EBS had a commercially viable and scalable broadband delivery platform; the BOS network control software was up and running and controlling Enron's network; EBS was ahead of where it expected to be in January 2000; and EBS, which Enron claimed was worth an estimated $30 billion in January 2000, was now, after deducting costs, worth $36 billion, with $21 billion of that figure derived from content services. These statements and others were false and misleading. Rice and Hannon did not disclose that EBS was performing worse than expected, that every business unit at EBS but one was losing more money than expected, that EBS did not have a cost effective or scalable broadband delivery platform, that the BOS network control software was still under development, that the Blockbuster deal was in danger of cancellation and had been extended only through March 2001, or that, even though EBS had yet to receive any recurring revenue from the Blockbuster deal, it already had sold the majority of the future revenue from the Blockbuster contract through the Braveheart transaction. Rice also stated that EBS would lose $65 million in 2001, even though he had been provided three days earlier with EBS's own internal estimate of far greater losses.

The Defendants' Stock Trading

33. Defendants HIRKO, YEAGER and SHELBY received shares and options relating to Enron stock as part of their compensation. At a time when they and others at Enron were making materially false and misleading public statements about EBS, the defendants sold large quantities of Enron stock, generating huge profits. Specifically, between January 20, 2000 and July 28, 2000, HIRKO sold $35,167,761.41 worth of Enron stock. Between January 23, 2001 and January 26, 2001, HIRKO sold an additional $35,212,724.00 in Enron stock. Between January 20, 2000 and August 23, 2000, YEAGER sold $54,282,194.76 in Enron stock. Between January 20, 2000 and July 19, 2000, SHELBY sold $35,230,923.89 worth of Enron stock.

COUNT ONE
(Conspiracy to Commit Wire and Securities Fraud)

34. The allegations of paragraphs 1 through 33 are realleged as if fully set forth here.

35. On or about and between at least April 19, 1999 and May 14, 2001, both dates being approximate and inclusive, within the Southern District of Texas and elsewhere, the defendants JOSEPH HIRKO, KEVIN HOWARD, SCOTT YEAGER, REX SHELBY and MICHAEL KRAUTZ, together with Kenneth Rice, Kevin Hannon and others, did knowingly and intentionally conspire (1) willfully and unlawfully to use and employ manipulative and deceptive devices and contrivances and directly and indirectly (i) to employ devices, schemes and artifices to defraud; (ii) to make untrue

statements of material fact and omit to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (iii) to engage in acts, practices, and courses of conduct which would and did operate as a fraud and deceit upon members of the investing public, in connection with the purchase and sale of Enron stock and by the use of the instruments of communication in interstate commerce and the mails, in violation of Title 15, United States Code, Section 78j(b), 78ff and Rule 10b-5 of the SEC, Title 17, Code of Federal Regulations, Section 240.10b-5, and (2) to devise a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises, and, for the purpose of executing such scheme and artifice, to cause interstate wire communications in violation of Title 18, United States Code, Section 1343.

OVERT ACTS

36. In furtherance of the conspiracy and to effect the objects thereof, within the Southern District of Texas and elsewhere, the defendants JOSEPH HIRKO, KEVIN HOWARD, SCOTT YEAGER, REX SHELBY, MICHAEL KRAUTZ, together with Kenneth Rice, Kevin Hannon and others, did commit and cause to be committed the following overt acts, among others:

False Press Release – 1999

a. On or about April 19, 1999, HIRKO, YEAGER, SHELBY and others issued and caused to be issued a press release regarding the Enron Intelligent Network.

The 2000 Analyst Conference

b. In or about and between November 1999 and January 2000, both dates being approximate and inclusive, HIRKO, HOWARD, YEAGER, SHELBY, Rice, and others attended meetings and participated in conference calls to plan the scheduled January 20, 2000 analyst conference.

c. On or about November 9, 1999, Rice instructed business consultants that Rice, HIRKO and SHELBY would be responsible for planning the upcoming January 2000 equity analyst conference.

d. On or about January 20, 2000, HIRKO, SHELBY, Rice, and others made false statements about EBS at Enron's equity analyst conference.

False Press Releases – 2000

e. On or about January 31, 2000, HIRKO, YEAGER, SHELBY, Rice, Hannon, and others issued and caused to be issued a press release regarding Sycamore Networks.

f. On or about March 30, 2000, HIRKO, YEAGER, SHELBY, Rice, Hannon, and others issued and caused to be issued a press release regarding VOD Network Solutions.

g. On or about April 11, 2000, HIRKO, YEAGER, SHELBY, Rice, Hannon, and others issued and caused to be issued a press release regarding AtomFilms.

h. On or about May 15, 2000, HIRKO, YEAGER, SHELBY, Rice, Hannon, and others issued and caused to be issued a press release regarding Warpspeed.

The 2001 Analyst Conference

i. In or about January 2001, Rice, Hannon and others attended meetings to plan the scheduled January 25, 2001 analyst conference.

j. On or about January 25, 2001, Rice, Hannon and others made false statements about EBS to equity analysts at Enron's equity analyst conference in Houston, Texas.

Project Braveheart

k. In or about early fall 2000, HOWARD ordered EBS employees to examine the Blockbuster agreement to see if EBS could use it to generate revenue in the fourth quarter of 2000.

l. On or about September 19, 2000, KRAUTZ sent an e-mail message to EBS employees regarding the Blockbuster agreement and the proposed monetization.

m. On or about October 10, 2000, HOWARD sent an e-mail message to an EBS employee discussing formation of the joint venture and the relevant accounting requirements.

n. On or about November 7, 2000, HOWARD caused an EBS employee to send an email message to a representative of nCube proposing formation of the joint venture.

o. On or about November 8, 2000, HOWARD met with an nCube executive to propose formation of the joint venture.

p. On or about November 22, 2000, HOWARD and KRAUTZ participated in a telephone conversation with nCube executives to discuss the proposed joint venture.

q. On or about November 22, 2000, KRAUTZ caused an EBS employee to send to nCube a document that set forth proposed accounting journal entries.

r. On or about November 30, 2000, HOWARD and KRAUTZ participated in a telephone conversation with nCube executives to discuss the proposed joint venture.

s. On or about December 13, 2000, KRAUTZ sent an e-mail message to Arthur Andersen and Enron employees describing the nature of nCube's investment in the joint venture.

t. On or about February 7, 2001, KRAUTZ sent an e-mail message to an EBS employee regarding possible disclosure of information to Arthur Andersen.

u. On or about February 16, 2001, HOWARD caused $1.7 million to be wired from an Enron bank account in New York to an nCube account at the Bank of America in Beaverton, Oregon.

v. On or about March 1, 2001, KRAUTZ sent an e-mail message to an EBS employee regarding EBS's performance of duties by the joint venture.

w. On or about March 15, 2001, HOWARD sent an e-mail message to EBS employees congratulating them on the Braveheart transaction.

x. In or about April 2001, HOWARD presented an executive summary of the Braveheart transaction to senior EBS executives. (Title 18, United States Code, Sections 371 and 3551 et seq.)

COUNT TWO
(Securities Fraud: January 2000 Analyst Conference)

37. The allegations of paragraphs 1 through 33 and 36(b-d) are realleged as if fully set forth here.

38. On or about January 20, 2000, within the Southern District of Texas and elsewhere, the defendants JOSEPH HIRKO, SCOTT YEAGER and REX SHELBY, together with Kenneth Rice and others, did willfully and unlawfully use and employ manipulative and deceptive devices and contrivances and directly and indirectly (i) employ devices, schemes and artifices to defraud; (ii) make untrue statements of material facts and omit to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (iii) engage in acts, practices, and courses of conduct which would and did operate as a fraud and deceit upon members of the investing public, in connection with purchases and sales of Enron stock and by the use of the instruments of communication in interstate commerce and the mails.

(Title 17, Code of Federal Regulations, Section 240.10b-5; Title 15, United States Code, Sections 78j(b) and 78ff; Title 18, United States Code, Sections 2 and 3551 et seq.)

COUNTS THREE THROUGH SIX
(Wire Fraud: April 1999 to July 2000)

39. The allegations of paragraphs 1 through 33 and 36(a) and (c-h) are realleged as if fully set forth here.

40. On or about the dates specified below, within the Southern District of Texas and elsewhere, the defendants JOSEPH HIRKO, SCOTT YEAGER and REX SHELBY, together with Rice and others, having devised a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises, did for the purpose of executing such scheme and artifice transmit and cause to be transmitted by means of wire communication in interstate commerce writings, signs, signals, pictures and sounds, as follows:

Count	Date	From	To	Description
3	1/31/00	New York, NY	Nationwide	Press Release
4	3/30/00	New York, NY	Nationwide	Press Release
5	4/11/00	New York, NY	Nationwide	Press Release
6	5/15/00	New York, NY	Nationwide	Press Release

(Title 18, United States Code, Sections 1343, 2 and 3551 et seq.)

COUNT SEVEN
(Securities Fraud: Project Braveheart)

41. The allegations of paragraphs 1 through 33 and 36(k-x) are realleged as if fully set forth here.

42. In or about and between fall 2000 and May 14, 2001, both dates being approximate and inclusive, within the Southern District of Texas and elsewhere, the defendants KEVIN HOWARD and MICHAEL KRAUTZ, together with others, did willfully and unlawfully use and employ manipulative and deceptive devices and contrivances and directly and indirectly (i) employ devices, schemes and artifices to defraud; (ii) make untrue statements of material facts and omit to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (iii) engage in acts, practices, and courses of conduct which would and did operate as a fraud and deceit upon members of the investing public, in connection with purchases and sales of Enron stock and by the use of the instruments of communication in interstate commerce and the mails.

(Title 17, Code of Federal Regulations, Section 240.10b-5; Title 15, United States Code, Sections 78j(b) and 78ff; Title 18, United States Code, Sections 2 and 3551 et seq.)

COUNTS EIGHT THROUGH TWENTY-TWO
(Wire Fraud: Project Braveheart)

43. The allegations of paragraphs 1 through 33 and 36(k-x) are realleged as if fully set forth here.

44. On or about the dates specified below, within the Southern District of Texas and elsewhere, the defendants KEVIN HOWARD and MICHAEL KRAUTZ, together with others, having devised a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises, did for the purpose of executing such scheme and artifice transmit and cause to be transmitted by means of wire communication in interstate commerce writings, signs, signals, pictures and sounds, as follows:

Count	Date	From	To	Description
8	11/07/00	Houston, TX	California	e-mail
9	11/17/00	Houston, TX	Oregon	e-mail
10	11/22/00	Houston, TX	Oregon	e-mail
11	11/22/00	Houston, TX	Oregon	e-mail
12	11/22/00	Houston, TX	Oregon	telephone call
13	11/30/00	Houston, TX	Oregon	telephone call

Count	Date	From	To	Description
14	12/08/00	Houston, TX	Oregon	e-mail
15	12/20/00	Houston, TX	Oregon	e-mail
16	1/24/01	Oregon	Houston, TX	e-mail
17	1/26/01	Houston, TX	Oregon	e-mail
18	1/26/01	Oregon	Houston, TX	e-mail
19	2/08/01	Houston, TX	Oregon	e-mail
20	2/14/01	Houston, TX	Oregon	e-mail
21	2/16/01	Houston, TX	Oregon	e-mail
22	2/16/01	Houston, TX	Oregon	e-mail

(Title 18, United States Code, Sections 1343,2 and 3551 et seq.)

COUNTS TWENTY-THREE THROUGH TWENTY-SIX
(2000 Insider Trading: JOSEPH HIRKO)

45. The allegations in paragraphs 1 through 33 are realleged as if fully set forth here.

46. On or about the dates set forth below, within the Southern District of Texas and elsewhere, the defendant JOSEPH HIRKO knowingly and willfully used and employed manipulative and deceptive devices and contrivances, by use of means and instrumentalities of interstate commerce, in violation of Rule 10b-5 of the Rules and Regulations of the United States Securities and Exchange Commission (Title 17, Code of Federal Regulations, Section 240.10b-5), in that he engaged in acts, practices, and courses of business which would operate as a fraud and deceit upon members of the investing public in connection with the purchase or sale of securities, in violation of Title 15, United States Code, Section 78j(b) and 78ff. Specifically, while in possession of material non-public information regarding the technological capabilities, value, revenue and business performance of Enron Communications, Inc. and Enron Broadband Services, HIRKO sold shares of Enron stock as follows, generating total proceeds of $35,167,761.41 :

Count	Date	Shares	Sale Price	Gross Proceeds
23	2/18/00	93,187	$69.3852	$6,465,798.63
24	4/20/00	130,650	$70.6972	$9,236,589.18
25	5/11/00	192,000	$78.0496	$14,985,523.20
26	5/12/00	58,000	$77.2388	$4,479,850.40

(Title 17, Code of Federal Regulations, Section 240.10b-5; Title 15, United States Code, Sections 78j(b) and 78ff; Title 18, United States Code, Sections 2 and 3551 et seq.)

COUNTS TWENTY-SEVEN THROUGH FORTY-SIX
(Insider Trading: SCOTT YEAGER)

47. The allegations in paragraphs 1 through 33 are realleged as if fully set forth here.

48. On or about the dates set forth below, within the Southern District of Texas and elsewhere, the defendant SCOTT YEAGER knowingly and willfully used and employed manipulative and deceptive devices and contrivances, by use of means and instrumentalities of interstate commerce, in violation of Rule 10b-5 of the Rules and Regulations of the United States Securities and Exchange Commission (Title 17, Code of Federal Regulations, Section 240.10b-5), in that he engaged in acts, practices, and courses of business which would operate as a fraud and deceit upon members of the investing public in connection with the purchase or sale of securities, in violation of Title 15, United States Code, Section 78j(b) and 78ff. Specifically, while in possession of material non-public information regarding the technological capabilities, value, revenue and business performance of Enron Communications, Inc. and Enron Broadband Services, YEAGER sold shares of Enron stock as follows, generating total proceeds of $54,282,923.89:

Count	Date	Shares	Sale Price	Gross Proceeds
27	1/21/00	100,000	$72.0689	$ 7,206,890.00
28	3/22/00	25,000	$75.00	$ 1,875,000.00
29	4/12/00	10,000	$73.7563	$ 737,563.00

30	5/10/00	10,000	$75.00	$ 750,000.00
31	5/11/00	10,000	$77.2650	$ 772,650.00
32	6/8/00	10,000	$72.00	$ 720,000.00
33	6/9/00	10,000	$74.00	$ 740,000.00
34	7/24/00	50,000	$74.8750	$ 3,743,750.00
35	7/27/00	25,000	$74.00	$ 1,850,000.00
36	7/27/00	25,000	$74.95	$ 1,873,750.00
37	7/27/00	25,000	$74.5315	$ 1,863,287.50
38	7/27/00	50,000	$75.8215	$ 3,791,075.00
39	7/27/00	50,000	$76.9669	$ 3,848,345.00
40	8/2/00	50,000	$77.8875	$ 3,894,375.00
41	8/7/00	80,500	$79.8633	$ 6,428,995.65
42	8/8/00	69,500	$81.0598	$ 5,633,656.10
43	8/14/00	25,000	$83.00	$ 2,075,000.00
44	8/16/00	25,000	$84.0018	$ 2,100,045.00
45	8/17/00	25,000	$85.35	$ 2,133,750.00
46	8/23/00	25,000	$89.7625	$ 2,244,062.50

(Title 17, Code of Federal Regulations, Section 240.10b-5; Title 15, United States Code, Sections 78j(b) and 78ff; Title 18, United States Code, Sections 2 and 3551 et seq.)

COUNTS FORTY-SEVEN THROUGH FIFTY-FOUR
(Insider Trading: REX SHELBY)

49. The allegations in paragraphs 1 through 33 are realleged as if fully set forth here.

50. On or about the dates set forth below, within the Southern District of Texas and elsewhere, the defendant REX SHELBY knowingly and willfully used and employed manipulative and deceptive devices and contrivances, by use of means and instrumentalities of interstate commerce, in violation of Rule 10b-5 of the Rules and Regulations of the United States Securities and Exchange Commission (Title 17, Code of Federal Regulations, Section 240.10b-5), in that he engaged in acts, practices, and courses of business which would operate as a fraud and deceit upon members of the investing public in connection with the purchase or sale of securities, in violation of Title 15, United States Code, Section 78j(b) and 78ff. Specifically, while in possession of material non-public information regarding the technological capabilities, value, revenue and business performance of Enron Communications, Inc. and Enron Broadband Services, SHELBY sold shares of Enron stock and generated total proceeds of $35,230,923.89 including but not limited to the following sales:

Count	Date	Shares	Sale Price	Gross Proceeds
47	1/21/00	75,000	$72.00	$5,400,000.00
48	1/21/00	75,000	$70.25	$5,268,750.00
49	2/1/00	50,000	$66.5469	$3,327,345.00
50	3/22/00	47,500	$75.00	$3,562,500.00

51	6/26/00	207,615	$70.8199	$14,703,273.54
52	6/27/00	1,450	$70.00	$101,500.00
53	6/28/00	39,665	$70.00	$2,776,550.00
54	7/19/00	1,230	$73.2144	$90,053.71

(Title 17, Code of Federal Regulations, Section 240.10b-5; Title 15, United States Code, Sections 78j(b) and 78ff; Title 18, United States Code, Sections 2 and 3551 et seq.)

COUNTS FIFTY-FIVE THROUGH SIXTY-SIX
(2000 Money Laundering: JOSEPH HIRKO)

51. The allegations in paragraphs 1 through 33, 46 and 50 are realleged as if fully set forth here.

52. On or about the dates listed in the chart below, within the Southern District of Texas and elsewhere, the defendant JOSEPH HIRKO did knowingly engage and attempt to engage, and did aid, abet, counsel, command, induce, procure and cause others to engage and attempt to engage in the following monetary transactions by, through or to a financial institution, affecting interstate commerce, in criminally derived property of a value greater than $10,000, to wit, the following transfers of funds generated through wire fraud and fraud in the sale of securities, which funds were derived from a specified unlawful activity, that is, wire fraud in violation of Title 18, United State Code, Section 1343, and fraud in the sale of securities in violation of Title 15, United States Code, Sections 78j(b) and

78ff and Title 17, Code of Federal Regulations, Section 240.10b-5.

Count	Date	Transaction
55	3/31/2000	Transfer of $224,500 from Paine Webber account no. HS 72449 to purchase 8,087.176 units of Pilgrim International Core Growth Fund Class A
56	3/31/2000	Transfer of $224,500 from Paine Webber account no. HS 72449 to purchase 13,944.099 units of Pilgrim International Value Class A
57	3/31/2000	Transfer of $224,500 from Paine Webber account no. HS 72449 to purchase 7,389.73 units of Pilgrim Growth & Value Class A
58	3/31/2000	Transfer of $224,500 from Paine Webber account no. HS 72449 to purchase 5,182.36 units of Federated Intl Small Company Fd A
59	4/4/2000	Transfer of $336,794 from Paine Webber account no. HS 72449 to Paine Webber account no. HS E5704
60	4/4/2000	Transfer of $336,794 from Paine Webber account no. HS 72449 to Paine Webber account no. HS E5705

61	4/4/2000	Transfer of $336,794 from Paine Webber account no. HS 72449 to Paine Webber account no. HS E5697
62	4/7/2000	Transfer of $96,500 from Paine Webber account no. HS 72449to Paine Webber account no. HS E5697
63	4/26/2000	Transfer of $2,860,716.53 from Paine Webber account no. HS 72449, by check no. HS76782 to Bank of America account no. 28041-15626
64	5/17/2000	Transfer of $3,674,635.99 from Paine Webber account no. HS 72449, by check no. HS78811 to Bank of America account no. 28041-15626
65	5/18/2000	Transfer of $1,087,216.54 from Paine Webber account no. HS 72449, by check no. HS78858 to Bank of America account no. 28041-15626
66	9/21/2000	Transfer of $234,068.43, as part of a larger transfer of $301,113.30 from Paine Webber account no. HM 01298 to Paine Webber account no. HM 0292

(Title 18, United States Code, Sections 1957, 2 and 3551 et seq.)

COUNTS SIXTY-SEVEN THROUGH ONE HUNDRED SIXTY-FIVE
(Money Laundering: SCOTT YEAGER)

53. The allegations in paragraphs 1 through 33, 40 and 48 are realleged as if fully set forth here.

54. On or about the dates listed in the chart below, within the Southern District of Texas and elsewhere, the defendant SCOTT YEAGER did knowingly engage and attempt to engage, and did aid, abet, counsel, command, induce, procure and cause others to engage and attempt to engage in the following monetary transactions by, through or to a financial institution, affecting interstate commerce, in criminally derived property of a value greater than $10,000, to wit, the following transfers of funds generated through wire fraud and fraud in the sale of securities, which funds were derived from a specified unlawful activity, that is, wire fraud in violation of Title 18, United State Code, Section 1343, and fraud in the sale of securities in violation of Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5.

Count	Date	Transaction
67	2/7/2000	Transfer of $250,000 by federal funds wire from Paine Webber Account no. HS E2608 to Salomon Smith Barney Account no. 414-4317510106
68	3/15/2000	Transfer of $1,000,000, by federal funds wire, from Paine Webber Account no. HS E2608 to EOL Partnership
69	4/5/2000	Transfer of $100,000 by federal funds wire from Paine Webber Account no. HS E2608 to BancFirst – Insured Escrow Service
70	4/10/2000	Transfer of $400,000 by federal funds wire from Paine Webber Account no. HS E2608 to Merrill Lynch account no. 230-63517
71	6/14/2000	Payment of $250,000.00 from Paine Webber Account no. HS E2608 to purchase 10 shares of Dreyfus Muni Income Inc.

72	6/14/2000	Payment of $750,000.00 from Paine Webber Account no. HS E2608 to purchase 30 shares of Muniyield Fund Inc
73	6/16/2000	Transfer of $425,000 by federal funds wire from Paine Webber Account no. HS E2608 to Merrill Lynch Account no. 230-63517
74	8/14/2000	Transfer of $10,000 by check number 102, payable to John Summers, from Paine Webber Account no. HS E2608
75	8/14/2000	Transfer of $10,000 by check number 103, payable to Russell Summers, from Paine Webber Account no. HS E2608
76	8/14/2000	Transfer of $10,000 by check number 106, payable to Justin Yeager, from Paine Webber Account no. HS E2608
77	8/14/2000	Transfer of $10,000 by check number 107 payable to Joshua Yeager, from Paine Webber Account no. HS E2608

78	8/14/2000	Transfer of $10,000 by check number 104, payable to Katie Sumners, from Paine Webber Account no. HS E2608
79	8/14/2000	Transfer of $10,000 by check number 105, payable to Katie Summers, from Paine Webber Account no. HS E2608
80	8/21/2000	Transfer of $50,000 by check number 109, payable to FSY Consultants, from Paine Webber Account no. HS E2608
81	8/23/2000	Payment of $2,000,000.00 from Paine Webber Account no. HS E2608 to purchase 2,000,000 units of Manulife North American
82	8/25/2000	Payment of $100,143.39 from Paine Webber Account no. HS E2608 to purchase 100,000 units of Gulf Coast Wtr Tex W/Sys Bonds

83	8/25/2000	Payment of $103,454.50 from Paine Webber Account no. HS E2608 to purchase 100,000 units of Western Wash Univ Wash Rev Bonds
84	8/25/2000	Payment of $105,936.25 from Paine Webber Account no. HS E2608 to purchase 105,000 units of Liberal Kans G.O. Bonds
85	8/25/2000	Payment of $106,299.38 from Paine Webber Account no. HS E2608 to purchase 105,000 units of West Vy City Mun. Bldg. Rev Bonds
86	8/25/2000	Payment of $144,743.33 from Paine Webber Account no. HS E2608 to purchase 150,000 units of Kansas City Mo Mac Rev Bonds
87	8/25/2000	Payment of $146,644.23 from Paine Webber Account no. HS E2608 to purchase 140,000 units of Utah St Brd Rgnts/R Crss Rev Bonds

88	8/25/2000	Payment of $160,973.55 from Paine Webber Account no. HS E2608 to purchase 155,000 units of Childress Tex Ctfs Oblig Bonds
89	8/25/2000	Payment of $197,031.39 from Paine Webber Account no. HS E2608 to purchase 200,000 units of Allen Tex Indpt Sch Dist Bonds
90	8/25/2000	Payment of $216,271.83 from Paine Webber Account no. HS E2608 to purchase 200,000 units of Decatur Ill Fgic Bonds
91	8/25/2000	Payment of $231,644.70 from Paine Webber Account no. HS E2608 to purchase 220,000 units of Westmoreland Cnty Pa Rev Bonds
92	8/25/2000	Payment of $254,735.36 from Paine Webber Account no. HS E2608 to purchase 245,000 units of Tarrant Cnty Tx Hlth Fac Dev Corp Bonds

93	8/25/2000	Payment of $258,130.75 from Paine Webber Account no. HS E2608 to purchase 250,000 units of Colorado Hlth Fac Bonds
94	8/28/2000	Transfer of $15,677.30 by check number 111, payable to American Express, from Paine Webber Account no. HS E2608
95	8/30/2000	Payment of $101,973.28 from Paine Webber Account no. HS E2608 to purchase 100,000 units of Harlandale ISD Texas Ref Sch Bldg Bonds
96	8/30/2000	Payment of $256,907.94 from Paine Webber Account no. HS E2608 to purchase 235,000 units of Harlandale ISD Texas Ref Sch Bldg Bonds
97	8/31/2000	Payment of $199,850.33 from Paine Webber Account no. HS E2608 to purchase 200,000 units of Johnson City Usd Ks G.O. Bldg Bonds

98	9/5/2000	Transfer of $50,000 by check number 112, payable to FSY Consultants, from Paine Webber Account no. HS E2608
99	9/5/2000	Transfer of $68,041.11 by check number 113, payable to Provident Bank, from Paine Webber Account no. HS E2608
100	9/6/2000	Payment of $207,022.33 from Paine Webber Account no. HS E2608 to purchase 200,000 units of Oconto Falls Wis Pub Sch Dist Bonds
101	9/6/2000	Transfer of $19,267.45 by check number 115, payable to American Express, from Paine Webber Account no. HS E2608
102	9/12/2000	Transfer of $210,000 by federal funds wire from Paine Webber Account no. HS E2608 to Gees Garrett
103	9/13/2000	Payment of $1,500,000.00 from Paine Webber Account no. HS E2608 to purchase 60 shares of Blackrock Inv Quality Muni Trust

104	9/19/2000	Payment of $161,705.30 from Paine Webber Account no. 1-TM E0123 to purchase 160,000 units of Collin Cnty Tx Ultd Tax bonds
105	10/5/2000	Payment of $230,219.59 from Paine Webber Account no. HM E0123 to purchase 225,000 units of US Treasury Notes
106	10/5/2000	Payment of $228,263.23 from Paine Webber Account no. HM E0123 to purchase 225,000 units of US Treasury Notes
107	10/5/2000	Payment of $100,863.89 from Paine Webber Account no. HM E0123 to purchase 100,000 units of US Treasury Notes
108	10/5/2000	Payment of $103,393.34 from Paine Webber Account no. HM E0123 to purchase 100,000 units of US Treasury Notes
109	10/5/2000	Payment of $225,600.25 from Paine Webber Account no. HM E0123 to purchase 225,000 units of US Treasury Notes

110	10/5/2000	Payment of $100,592.38 from Paine Webber Account no. HM E0123 to purchase 100,000 units of US Treasury Notes
111	10/5/2000	Payment of $75,751.65 from Paine Webber Account no. HM E0123 to purchase 75,000 units of US Treasury Notes
112	10/5/2000	Payment of $154,103.92 from Paine Webber Account no. HM E0123 to purchase 150,000 units of US Treasury Notes
113	10/12/2000	Payment of $95,035.87 from Paine Webber Account no. HM E0123 to purchase $95,000 certificate of deposit from IBJ Whitehall Bk & Trst
114	10/17/2000	Transfer of $67,837.92 by check number 124, payable to Provident Bank, from Paine Webber Account no. HM E0123
115	10/19/2000	Transfer of $232,605.25 by federal funds wire from Paine Webber Account no. HM E0123 to Garrett Aviation Services

116	10/25/2000	Payment of $96,837.72 from Paine Webber Account no. HM E0123 to purchase 100.000 units of Aldine Tex Isd bonds
117	10/25/2000	Payment of $99,718.25 from Paine Webber Account no. HM E0123 to purchase 100.000 units of Chattanooga Tn Elect Sys Rev bonds
118	10/25/2000	Payment of $99,543.64 from Paine Webber Account no. HM E0123 to purchase 100.000 units of Harris Cnty Tex Rfdg Toll Rev bonds
119	10/25/2000	Payment of $103,231.00 from Paine Webber Account no. HM E0123 to purchase 100.000 units of Lake Co IL Cons S/D # 50 bonds
120	10/25/2000	Payment of $97,652.50 from Paine Webber Account no. HM E0123 to purchase 100.000 units of St Louis Mo Cop Cap Impt bonds

121	10/25/2000	Payment of $102,947.00 from Paine Webber Account no. HM E0123 to purchase 100,000 units of Socorro Tex Indpt Sch bonds
122	10/25/2000	Payment of $94,952.50 from Paine Webber Account no. HM E0123 to purchase 100,000 units of Travis Cnty Tex bonds
123	10/26/2000	Payment of $107,819.97 from Paine Webber Account no. HM E0123 to purchase 100,000 units of Allen Cnty Ind Jail Bldg Corp Rev bonds
124	10/27/2000	Payment of $94,515.50 from Paine Webber Account no. HM E0123 to purchase 100,000 units of Travis Cnty Tex bonds
125	11/2/2000	Transfer of $150,000 by federal funds wire from Paine Webber Account no. HM E0123 to Merrill Lynch account no. 230-6351
126	11/6/2000	Payment of $178,054.50 from Paine Webber Account no. HM E0123 to purchase 30,000 units of Enron Corp call options

127	11/7/2000	Transfer of $536,575.18 by federal funds wire from Paine Webber Account no. HM E0123 to Chase Manhattan Mortgage
128	11/7/2000	Payment of $95,096.67 from Paine Webber Account no. HM E0123 to purchase $95,000 certificate of deposit from BSB Bank & Trust
129	11/13/2000	Transfer of $150,000 from Paine Webber account no. HM E0123 to Paine Webber account no. HM 80178-0100
130	11/13/2000	Transfer of $700,000 from Paine Webber account no. HM E0123 to Paine Webber account no. HM 80179-8100
131	11/13/2000	Transfer of $500,000 from Paine Webber account no. HM E0123 to Paine Webber account no. HM 80180-1100
132	11/13/2000	Transfer of $500,000 from Paine Webber account no. HM E0123 to Paine Webber account no. HM 80181-0100

133	11/13/2000	Transfer of $150,000 from Paine Webber account no. HM E0123 to Paine Webber account no. HM 80182-8100
134	11/14/2000	Payment of $100,410.83 from Paine Webber Account no. HM E0123 to purchase 100,000 units of McKinney Texas Wtrwks & Rev bonds
135	11/27/2000	Transfer of $200,000 by federal funds wire from Paine Webber Account no. HM E0123 ES to Merrill Lynch account no. 230-63517
136	12/5/2000	Transfer of $100,000 from Paine Webber account no. HM E0123 to Paine Webber account no. HM 80178-0100
137	12/5/2000	Transfer of $100,000 from Paine Webber account no. HM E0123 to Paine Webber account no. HM 80179-8100
138	12/5/2000	Transfer of $100,000 from Paine Webber account no. HM E0123 to Paine Webber account no. HM 80180-1100

139	12/5/2000	Transfer of $100,000 from Paine Webber account no. HM E0123 to Paine Webber account no. HM 80181-0100
140	12/5/2000	Transfer of $100,000 from Paine Webber account no. HM E0123 to Paine Webber account no. HM 80182-8100
141	12/7/2000	Transfer of $1,974.22, as part of larger transfer of $11,740.12, by check number 153, payable to American Express, from Paine Webber Account no. HM E0123
142	12/18/2000	Payment of $95,204.58 from Paine Webber Account no. HM E0123 to purchase $95,000 certificate of deposit from Peoples Heritage Bank
143	12/15/2000	Transfer of $14,850.88 by check number 154, payable to University of Notre Dame, from Paine Webber Account no. HM E0123

144	12/29/2000	Transfer of $150,000 by check number 156, payable to FYI Realty, from Paine Webber Account no. HM E0123
145	12/29/2000	Transfer of $350,000 by check number 157, payable to FSY Consultants, from Paine Webber Account no. HM E0123
146	12/30/2000	Transfer of $17,321.37 by check number 159, payable to Haverford College, from Paine Webber Account no. HM E0123
147	1/11/2001	Transfer of $33,671.91 by check number 161, payable to American Express, from Paine Webber Account no. HM E0123
148	1/14/2001	Transfer of $11,347.50 by check number 163, payable to La Bandera Ranch, from Paine Webber Account no. HM E0123

149	04/23/2001	Payment of $244,198.17 from Paine Webber Account no. HM E0123 to purchase 255,000 units of Allen Tex Indpt Sch Dist bonds
150	04/23/2001	Payment of $99,816.06 from Paine Webber Account no. HM E0123 to purchase 100,000 units of Decatur Tx Isd Ult Sch Bldg bonds
151	04/23/2001	Payment of $100,100.67 from Paine Webber Account no. HM E0123 to purchase 100,000 units of Barton Cnty Kans USD bonds
152	04/23/2001	Payment of $99,613.22 from Paine Webber Account no. HM E0123 to purchase 100,000 units of Araphoe Libr Dist Colo C.O.P. Rev bonds
153	04/23/2001	Payment of $99316.06 from Paine Webber Account no. HM E0123 to purchase 100,000 units of Hurst-Euless Bedford Tex bonds

154	04/23/2001	Payment of $110,007.92 from Paine Webber Account no. HM E0123 to purchase 110,000 units of Mansfield Texas Ww/Ss Rv bonds
155	04/23/2001	Payment of $119,692.69 from Paine Webber Account no. HM E0123 to purchase 125,000 units of Maricopa Cnty Ariz Sch bonds
156	05/02/2001	Payment of $129,341.68 from Paine Webber Account no. HM E0123 to purchase 110,000 units of Pflugerville Tex Cap Gty bonds
157	05/03/2001	Payment of $98,885.78 from Paine Webber Account no. HM E0123 to purchase 100,000 units of West Ouachita Par S/D La Rev bonds
158	05/03/2001	Payment of $98,804.00 from Paine Webber Account no. HM E0123 to purchase 100,000 units of West Ouachita Par S/D La Rev bonds

159	05/15/2001	Payment of $105,274.72 from Paine Webber Account no. HM E0123 to purchase 100,000 units of New Braunfels Texas Isd Unltd bonds
160	5/15/2001	Transfer of $200,000 by check number 177, payable to FYI Net, from Paine Webber Account no. HM E0123
161	6/4/2001	Transfer of $75,000 by electronic funds transfer from Paine Webber Account no. HM E0123 to Bank of America
162	6/4/2001	Transfer of $10,000 by electronic funds transfer from Paine Webber Account no. HM E0123 to Compass Bank
163	6/6/2001	Transfer of $55,701.89 by automatic payment to Provident Bank from Paine Webber Account no. HM E0123
164	6/19/2001	Transfer of $50,000 by check number 179, payable to US Treasury, from Paine Webber Account no. HM E0123

165	9/18/2001	Transfer of $930,926.68, as part of a larger transfer of $3,405,739.03, from Paine Webber Account no. HM E0123 to First Union Account no. 8845-9357

(Title 18, United States Code, Sections 1957, 2 and 3551 et seq.)

COUNTS ONE HUNDRED SIXTY-SIX THROUGH ONE HUNDRED SEVENTY-ONE
(Money Laundering: REX SHELBY)

55. The allegations in paragraphs 1 through 33, 40 and 50 are realleged as if fully set forth here.

56. On or about the dates listed in the chart below, within the Southern District of Texas and elsewhere, the defendant REX SHELBY did knowingly engage and attempt to engage, and did aid, abet, counsel, command, induce, procure and cause others to engage and attempt to engage in the following monetary transactions by, through or to a financial institution, affecting interstate commerce, in criminally derived property of a value greater than $10,000, to wit, the following transfers of funds generated through wire fraud and fraud in the sale of securities, which funds were derived from a specified unlawful activity, that is, wire fraud in violation of Title 18, United State Code, Section 1343, and fraud in the sale of securities in violation of Title 15, United States Code, Sections 78j(b) and

78ff and Title 17, Code of Federal Regulations, Section 240.10b-5.

Count	Date	Transaction
166	2/16/2001	Transfer of $5,449,848.66, as part of a larger transfer of $5,454,737.19, from Paine Webber account no. HM E0299 to Paine Webber account no. HM E0109
167	4/2/2002	Transfer of $800,000 by check no.107 from Paine Webber account no. HM E0109 to Fidelity Cash Reserves account no. 2BX-812021
168	4/2/2002	Transfer of $400,000 by check no. 108 from Paine Webber account no. HM E0109 to Fidelity Municipal Money Market account no. 2BX-812021
169	4/6/2002	Transfer of $1,200,000 by check no. 109 from Paine Webber account no. HM E0109 to Vanguard Prime Money Market Fund account no. 9956144176 ($800,000) and to Vanguard Federal Money Market Fund account no. 9956144176 ($400,000)

170	4/6/2002	Transfer of $1,600,000 by check no. 110 from Paine Webber account no. HM E0109 to Dreyfus Money Market Reserves account no. 317-000146591-3 ($800,000) and to Dreyfus Worldwide Dollar Money Market Fund account no. 762- 0214600876 ($800,000)
171	4/7/2002	Transfer of $1,200,000 by check no. 111 from Paine Webber account no. HM E0109 to T. Rowe Price Summit Cash Reserves Fund account no. 522676398-0 ($800,000) and to T. Rowe Price Short Term Bond Fund account no. 522676402-8 ($400,000)

(Title 18, United States Code, Sections 1957.2 and 3551 et seq.)

COUNTS ONE HUNDRED SEVENTY-TWO THROUGH ONE HUNDRED SEVENTY-FOUR
(2001 Insider Trading: JOSEPH HIRKO)

57. The allegations in paragraphs 1 through 33 are realleged as if fully set forth here.

58. On or about the dates set forth below, within the Southern District of Texas and elsewhere, the defendant JOSEPH HIRKO knowingly and willfully used and employed manipulative and

deceptive devices and contrivances, by use of means and instrumentalities of interstate commerce, in violation of Rule 10b-5 of the Rules and Regulations of the United States Securities and Exchange Commission (Title 17, Code of Federal Regulations, Section 240.10b-5), in that he engaged in acts, practices, and courses of business which would operate as a fraud and deceit upon members of the investing public in connection with the purchase or sale of securities, in violation of Title 15, United States Code, Section 78j(b) and 78ff. Specifically, while in possession of material non-public information regarding the technological capabilities, value, revenue, and business performance and strategy of Enron Broadband Services, HIRKO sold shares of Enron stock as follows, generating total proceeds of $35,212,724.00:

Count	Date	Shares	Sale Price	Gross Proceeds
172	1/23/01	100,000	$ 78.4010	$7,840,100.00
173	1/25/01	100,000	$ 81.0000	$8,100,000.00
174	1/26/01	235,032	$ 82.0000	$19,272,624.00

(Title 17, Code of Federal Regulations, Section 240.10b-5; Title 15, United States Code, Sections 78j(b) and 78ff; Title 18, United States Code, Sections 2 and 3551 et seq.)

COUNTS ONE HUNDRED SEVENTY-FIVE AND ONE HUNDRED SEVENTY-SIX
(2001 Money Laundering: JOSEPH HIRKO)

59. The allegations in paragraphs 1 through 33 and 58 are realleged as if fully set forth here.

60. On or about the dates listed in the chart below, within the Southern District of Texas and elsewhere, the defendant JOSEPH HIRKO did knowingly engage and attempt to engage, and did aid, abet, counsel, command, induce, procure and cause others to engage and attempt to engage in the following monetary transactions by, through or to a financial institution, affecting interstate commerce, in criminally derived property of a value greater than $10,000, to wit, the following transfers of funds generated through wire fraud and fraud in the sale of securities, which funds were derived from a specified unlawful activity, that is, fraud in the sale of securities in violation of Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5.

Count	Date	Transaction
175	1/30/01	Transfer of $2,099,605.00 by wire from Paine Webber account no. HM E0292 to Bank of America account no. 28041-15627
176	2/01/01	Transfer of $8,243,362.00 by wire from Paine Webber account no. HM E0292 to Bank of America account no. 28041-15626

(Title 18, United States Code, Sections 1957, 2 and 3551 et seq.)

FORFEITURE ALLEGATIONS

61. Upon conviction of one or more of the wire fraud or fraud in the sale of securities offenses alleged in this Fifth Superseding Indictment, defendants HIRKO, SHELBY and YEAGER each shall forfeit to the United States pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461 (c) any property constituting or derived from proceeds obtained directly or indirectly as a result of the said violations, including but not limited to the properties listed in paragraph 63 below.

62. Upon conviction of one or more of the money laundering offenses alleged in this Fifth Superseding Indictment, each defendant shall forfeit to the United States pursuant to 18 U.S.C § 982(a)(1) the following property:

a. all right, title, and interest in any and all property involved in each offense in violation of 18 U.S.C. § 1957 for which the defendant is convicted, and all property traceable to such property, including the following: (1) all money or other property that was the subject of each transaction, transportation, transmission, or transfer in violation of Section 1957, including but not limited to the properties listed in paragraph 63 below: (2) all commissions, fees and other property constituting proceeds obtained as a result of those violations;

and (3) all property used in any manner or part to commit or to facilitate the commission of those violations.

b. A sum of money equal to the total amount of money involved in each offense, or conspiracy to commit such offense, for which the defendant is convicted. If more than one defendant is convicted of an offense, the defendants so convicted are jointly and severally liable for the amount involved in such offense.

63. The United States intends to forfeit property of the defendants including, but not limited to, the following:

a. With respect to defendant SCOTT YEAGER, the following property:

(i) The contents of First Union Account no. 8845-9357, in the name of F. Scott Yeager and Susan S. Yeager, including $12.52 in cash and/or money market funds, and securities identified in Attachment 3;

(ii) $81,223.15 in cash and/or money market funds, and securities identified in Attachment 4, held in the name "Andrew J. Clark III, Attorney at Law FBO F. Scott Yeager Legal Fund" in Wachovia account no. 3429-2303;

(iii) $409,285.48 in cash and/or money market funds, and

securities identified in Attachment 5 contained in Wachovia account no. 3429-2301, in the name of F. Scott Yeager and Susan S. Yeager;

(iv) $268,258.92 in cash and/or money market funds contained in Wachovia account no. 3429-2307, in the name of Andrew J. Clark, III, Attorney;

(v) A 17.5% interest in the limited partnership of EOL Ranch, LTD;

(vi) Real property known as Building site Unit 30, Replat of Trails End, Llano County, Texas;

(vii) Real property known as 996 Indiana Creek Road, Blue River, Colorado, also known as Lot 38, Spruce Valley Ranch, Filing no. 1, County of Summit, Colorado;

(viii) $23,345.28 in cash and/or money market funds in Bank of America Account no. 5777666280, in the name of FYI Realty;

(ix) $22,629.16 in cash and/or money market funds in Bank of America Account no. 5777666293, in the name of FSY Consultants;

(x) $143.32 in cash and/or money market funds and securities identified in Attachment 6 contained in Charles Schwab

Account no. 10331774, in the name of FYI Net.com, LP;

(xi) 23,086.74 shares of Goldman Sachs Ultra-Short Duration Govt Fund, Merrill Lynch Account no. 230-63517;

(xii) $1,897,237.96 in cash and/or money market funds representing the sales proceeds of a 1983 Cessna Citation Airplane.

b. With respect to defendant REX SHELBY, the following property:

(i) $811,107.09 in Fidelity Cash Reserve account no. 2BX-812021055, in the name of Rex T. Shelby;

(ii) $404,259.77 in Fidelity Municipal Money Market account no. 2BX812021-010, in the name of Rex T. Shelby;

(iii) the contents of Vanguard Prime Money Market account no. 09956144176-0030, in the name of Rex T. Shelby;

(iv) the contents of Vanguard Federal Money Market account no. 09956144176-0033, in the name of Rex T. Shelby;

(v) the contents of Dreyfus Money Market Reserve account no.

3170001465913, in the name of Rex T. Shelby;

(vi) the contents of Dreyfus Worldwide Dollar Money Market Fund account no. 762-0214600876, in the name of Rex T. Shelby;

(vii) the contents of T. Rowe Price Summit Cash Reserve account no. 522676398-0, in the name of Rex T. Shelby;

(viii) the contents of T. Rowe Price Short Term Bond account no. 522676402-8, in the name of Rex T. Shelby;

(ix) $4,177,791.32 in Paine Webber account no. HM E0109, in the name of Rex T. Shelby.

c. With respect to defendant JOSEPH HIRKO, the following property:

(i) $506,842.03 in cash and/or money market funds, and securities identified in Attachment 7 contained in US Trust Account no. 75282700;

(ii) $2,172,350.67 in Columbia Fund Account no. 141616, Columbia Daily Income Money Market Fund;

(iii) $1,947,354.48 in cash and/or money market funds, and securities identified in

Attachment 8 contained in Goldman Sachs account number 026-38602-9;

(iv) Contents of Goldman Sachs account number 026-38756-3, including securities listed in Attachment 9;

(v) the contents of US Trust Account no. 75272705, including approximately $113,092.64 in cash and/or money market funds, and securities identified in Attachment 10;

(vi) the contents of US Trust Account no. 75282706, including approximately $26,941.75 in cash and/or money market funds, and securities identified in Attachment 11;

(vii) the contents of US Trust Account no. 75282707, including approximately $41,251.83 in cash and/or money market funds, and securities identified in Attachment 12;

(viii) Real property known as Hakuli'A Phase, Phase I, Lot 182, South Kona, Hawaii, purchased for $780,000;

(ix) Equity golf membership, The Club at Kokulia, purchased for $150,000;

64. Pursuant to 21 U.S.C. § 853(p), as incorporated by Title 18, United States Code, Section 982(b), each defendant shall forfeit substitute property, up to the value of the amount described in paragraphs 61 and 62, if, by any act or omission of said defendant,

a. cannot be located upon the exercise of due diligence;

b. has been transferred, sold to or deposited with a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty.

All in accordance with 18 U.S.C. § 982(a)(1), and Rule 32.2(a), Federal Rules of Criminal Procedure.

(Title 18, United States Code, Sections 981 and 982; Title 28 United States Code, Section 2461.)

SENTENCING ALLEGATIONS

65. With respect to each defendant charged in Counts One through Twenty-Two of the Indictment:

(a) the loss involved in the offense exceeded $80 million;

(b) the offense involved more than minimal planning;

(c) the offense involved a scheme to defraud more than 1 victim;

(d) the offense involved sophisticated means; and

(e) the offense was committed through mass marketing.

66. With respect to Count One of the Indictment

(a) Defendant Hirko was a leader and organizer of a criminal activity that involved five or more participants and was otherwise extensive;

(b) Defendants Yeager and Shelby were each managers and supervisors and the criminal activity involved five or more participants and was otherwise extensive; and

(c) Defendants Hirko, Shelby, Howard and Krautz each abused their positions of public and private trust and defendants Howard and Krautz used special skills in a manner that significantly facilitated the commission and concealment of the offenses.

67. With respect to Counts Two through Six of the Indictment

(a) Defendant Hirko was a leader and organizer of a criminal

activity that involved five or more participants and was otherwise extensive; and

(b) Defendants Yeager and Shelby were each managers and supervisors and the criminal activity involved five or more participants and was otherwise extensive; and

(c) Defendants Hirko and Shelby each abused their positions of public and private trust in a manner that significantly facilitated the commission and concealment of the offenses.

68. With respect to Counts Seven through Twenty-Two of the Indictment:

(a) Defendant Howard was a leader and organizer of a criminal activity that involved five or more participants and was otherwise extensive;

(b) Defendant Krautz was a manager and supervisor and the criminal activity involved five or more participants and was otherwise extensive; and

(c) Defendants Howard and Krautz each abused their positions of public and private trust and used special skills in a manner that significantly facilitated the

commission and concealment of the offenses.

69. With respect to each defendant charged in Counts Twenty-Three through Fifty-Four and One Hundred Seventy-Two through One Hundred Seventy-Four of the Indictment:

(a) the gain is equivalent to the gross proceeds amount set forth in each particular count; and

(b) each defendant abused their positions of public and private trust in a manner that significantly facilitated the commission and concealment of the offenses.

70. With respect to each defendant charged in Counts Fifty-Five through One Hundred Seventy-One and One Hundred Seventy-Five and One Hundred Seventy-Six:

(a) Each defendant knew that the funds involved in the offense were proceeds of a specified unlawful activity, specifically, securities fraud, in violation of Title 15, United States Code, Section 78j(b) and 78ff; and

(b) the value of the funds involved in the offense is set forth in each particular count.

Dated: Houston, Texas

November 5 2004

A TRUE BILL

/s/ MP Johnson
FOREPERSON

JOSHUA R. HOCHBERG
Acting U.S. Attorney

ANDREW WEISSMANN
Director, ENRON TASK FORCE

By: /s/ Lisa O. Monaco
SEAN M. BERKOWITZ

BENTON J. CAMPBELL
LISA O. MONACO
Special Assistant United States Attorneys
ENRON TASK FORCE

PATRICK MURPHY
Trial Attorney, ENRON TASK FORCE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATED OF AMERICA	§	
	§	CRIMINAL
	§	ACTION
v.	§	NO. H-03-0093
JOSEPH HIRKO, KEVIN HOWARD, SCOTT YEAGER, REX SHELBY, MICHAEL KRAUTZ,	§	

COURT'S INSTRUCTIONS TO THE JURY

Members of the Jury:

You have heard the evidence in this case and the arguments of the attorneys. I will now instruct you on the law that you must apply.

First, I will give you some general instructions which apply in every case, for example, instructions about burden of proof and how to judge the believability of witnesses. Then I will give you some specific rules of law about this particular case, and finally I will explain to you the procedures you should follow in your deliberations.

You, as jurors, are the judges of the facts. But in determining what actually happened, that is, in reaching your decision as to the facts, it is your sworn duty to follow all of the rules of law as I explain them to you. Unless otherwise stated, you

should consider each instruction to apply separately and individually to each defendant.

You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I give it to you, regardless of the consequences.

It is also your duty to base your verdict solely upon the testimony and evidence, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors, and they have the right to expect nothing less.

The indictment or formal charge against a defendant is not evidence of guilt. Indeed, the defendants are presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all. As you know, all of the defendants testified in this case. However, under our Constitution, a defendant has no obligation to testify or to present any other evidence because it is the prosecution's burden to prove each defendant guilty beyond a reasonable doubt. This burden remains with the prosecution throughout the entire trial and never shifts to a defendant. A defendant is never required to prove that he is innocent.

While the government's burden of proof is a strict or heavy burden, it is not necessary that a defendant's guilt be proved beyond all possible doubt. It is only required that the government's

proof exclude any "reasonable doubt" concerning a defendant's guilt.

A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that the accused has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

As I told you earlier, it is your duty to determine the facts. In doing so, you must consider only the evidence presented during the trial, including the sworn testimony of the witnesses and the exhibits. Remember that any statements, objections, or arguments made by the lawyers are not evidence. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

During the trial I sustained objections to certain questions and exhibits. You must disregard those questions and exhibits entirely. Do not speculate as to what the witness would have said if permitted to answer the question or as to the contents of an exhibit. Also, certain testimony or other evidence has been ordered stricken from the record and you have been instructed to disregard this evidence. Do not consider any testimony or

other evidence which has been stricken in reaching your decision. Your verdict must be based solely on the legally admissible evidence and testimony.

At various times during the course of the trial I have admitted evidence for a limited purpose. For example on several occasions I have admitted evidence not for the truth of the matter asserted but rather to establish some other purpose such as the state of mind of a defendant or witness or his understanding of certain events. You are to consider such evidence only for the limited purpose that I have admitted it and not for any other purpose.

Also, do not assume from anything I may have done or said during the trial that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law or my rulings and instructions to you regarding the evidence, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

While you should consider only the evidence, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the evidence.

You should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. "Circumstantial evidence" is proof of a chain of events and circumstances indicating that something

is or is not a fact. The law makes no distinction between the weight you may give to either direct or circumstantial evidence. It requires only that you weigh all of the evidence and be convinced of a defendant's guilt beyond a reasonable doubt before a defendant can be convicted.

I remind you that it is your job to decide whether the government has proved the guilt of each defendant beyond a reasonable doubt. In doing so, you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given the witness's testimony. An important part of your job will be making judgments about the testimony of the witnesses including the defendants who testified in this case. You should decide whether you believe what each person had to say and how important that testimony was. In making that decision I suggest that you ask yourself a few questions: Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the government or the defense? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to understand the questions clearly and to answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

The testimony of the defendant should be weighed and his credibility evaluated in the same way as that of any other witness.

In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point. Your job is to think about the testimony of each witness you have heard and to decide how much you believe of what each witness had to say.

Where a defendant has offered evidence of good general reputation or opinion for truth and veracity, or honesty and integrity, or as a law-abiding citizen, you should consider such evidence along with all the other evidence in the case.

Evidence of a defendant's character, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since you may think it improbable that a person of good character in respect to those traits would commit such a crime.

The law does not require the prosecution to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require the prosecution to produce as exhibits all papers or other items mentioned in the evidence.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or

producing any evidence, and no adverse inferences may be drawn from his failure to do so.

The testimony of a witness may be discredited or "impeached" by showing that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness said or did something, or failed to say or do something, which is inconsistent with the testimony the witness gave at this trial.

Earlier statements of a witness were not always admitted in evidence to prove that the contents of those statements are true. In those instances where they were not admitted for the truth, you may consider the earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness and therefore whether they affect the credibility of that witness.

If you believe that any witness has been discredited in this manner, then it is your exclusive right to give the testimony of that witness whatever weight, if any, you think it deserves.

You have heard the testimony of Luitgard Fischer. You also heard testimony from others concerning their opinion about whether that witness is a truthful person or the witness's reputation, in the community where the witness worked, for telling the truth. It is up to you to decide from what you heard here whether Luitgard Fischer was telling the truth in this trial. In deciding this, you should bear in mind the testimony concerning the witness's reputation for truthfulness as well as all the other factors already mentioned.

The testimony of an alleged accomplice, and the testimony of one who provides evidence against a defendant for immunity from punishment or for personal advantage or vindication, must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses. You, the jury, must decide whether the witness's testimony has been affected by any of those circumstances, or by the witness's interest in the outcome of the case, or by prejudice against the defendant, or by the benefits that the witness has received as a result of being immunized from prosecution. You should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never convict any defendant upon the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt.

In this case the government called as one of its witnesses an alleged accomplice named as a co-defendant in the indictment, with whom the government has entered into plea agreements providing for the dismissal of some charges and a lesser sentence than the co-defendant would otherwise be exposed to for the offense for which the co-defendant plead guilty. Such plea-bargaining, as it is called, has been approved as lawful and proper, and is expressly provided for in the rules of this Court.

An alleged accomplice, including one who has entered into a plea agreement with the government, is not prohibited from testifying. On the contrary, the testimony of such a witness may alone be of sufficient weight to sustain a verdict of guilty. You should keep in mind that such testimony is always

received with caution and weighed with great care. You should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe that testimony beyond a reasonable doubt. The fact that an alleged accomplice has entered a plea of guilty to an offense charged is not evidence of the guilt of any other person.

During the trial you heard the testimony of Michael Mulligan, who has expressed opinions concerning accounting issues. If technical or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state an opinion concerning such matters.

Merely because an expert witness has expressed an opinion does not mean, however, that you must accept this opinion. The same as with any other witness, it is up to you to decide whether you believe this testimony and choose to rely upon it. Part of that decision will depend on your judgment about whether the witness's background or training and experience is sufficient for the witness to give the expert opinion that you heard. You must also decide whether the witness's opinions were based on sound reasons, judgment, and information.

In deciding whether to accept or rely on the opinion of an expert witness, you may also consider any bias of the witness, including any bias you may infer from evidence that the expert witness has been or will be paid for reviewing the case and testifying, or from evidence that he testifies regularly as an

expert witness and his income from such testimony represents a significant portion of his income.

Certain charts and summaries have been shown to you to help explain the facts disclosed by the books, records, and other documents which are in evidence in the case. Charts and summaries are valid only to the extent that they accurately reflect the underlying supporting evidence. You should give them only such weight as you think they deserve.

You will note that the indictment charges that the offense was committed on or about a specified date. The government does not have to prove that the crime was committed on that exact date, so long as the government proves beyond a reasonable doubt that the defendant committed the crime on a date reasonably near the date stated in the indictment.

You are here to decide whether the government has proved beyond a reasonable doubt that each defendant is guilty of the crime charged. The defendants are not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you concerned with the guilt of any other person or persons not on trial as a defendant in this case, except as you are otherwise instructed.

If a defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not enter your consideration or discussion.

A separate crime is charged against one or more of the defendants in each count of the indictment. Not all defendants are charged in each count. Accordingly, not all evidence presented relates to all defendants. Each count, and the

evidence pertaining to it, should be considered separately. The case of each defendant should be considered separately and individually. The fact that you may find one or more of the accused not guilty or guilty of any of the crimes charged should not control your verdict as to any other crime or any other defendant. You must give separate consideration to the evidence as to each defendant.

For example, only Defendants JOSEPH HIRKO, SCOTT YEAGER, and REX SHELBY are charged with securities fraud in Count 2 and wire fraud in Counts 3 through 6 of the indictment. Accordingly, the evidence presented regarding those counts should be considered only as to those defendants. Only Defendants KEVIN HOWARD and MICHAEL KRAUTZ are charged with securities fraud in Count 7 and wire fraud in Counts 8 through 22 of the indictment, relating to the Project Braveheart transaction. Accordingly, the evidence presented regarding those counts should be considered only as to those defendants. Additionally, only Defendants JOSEPH HIRKO, SCOTT YEAGER, and REX SHELBY are charged in the counts relating to insider trading and money laundering, so the evidence relating to insider trading and money laundering should be considered as to those defendants only.

You have heard reference at times during the trial to various Enron internal ethical standards and certain civil regulations. You have also heard reference at times to various applicable accounting requirements which deal with the recognition of earnings from the Braveheart transaction. A violation of these standards, regulations, or requirements should not be considered by you as a

violation of the criminal law. You may consider, however, evidence of a knowing and intentional violation of these standards, regulations, or requirements as you would any other evidence in determining whether or not the defendant had the required motive or criminal intent. You are reminded that the government must prove each element of the offense beyond a reasonable doubt.

The mere fact that transactions in this case involved millions of dollars does not mean that the defendants are held to a greater standard of conduct than had the case involved smaller sums of money. The laws apply the same in all cases. By the same token, it is up to you to determine the weight, if any, of this evidence.

The jury should not conclude that merely because the parties involved in the case dealt in large sums of money that the defendants were guilty of any wrongdoing. The presumption of innocence applies to every defendant in every case equally without regard to the number of dollars in the transaction.

Specific Instructions

CONSPIRACY

Count One
(Conspiracy to Commit Wire and Securities Fraud)

In Count One of the Indictment, the government alleges that defendants JOSEPH HIRKO, KEVIN HOWARD, SCOTT YEAGER, REX SHELBY, and MICHAEL KRAUTZ, with participating in a criminal conspiracy to commit fraud in connection with the purchase and sale of securities, known as "securities fraud" and to commit

fraud through the use of interstate wire communications, known as "wire fraud." Count One of the Indictment charges as follows:

On or about and between at least April 19, 1999 and May 14, 2001, both dates being approximate and inclusive, within the Southern District of Texas and elsewhere, the defendants

JOSEPH HIRKO,

KEVIN HOWARD,

SCOTT YEAGER,

REX SHELBY and

MICHAEL KRAUTZ,

together with Kenneth Rice, Kevin Hannon, and others, did knowingly and intentionally conspire (1) to commit securities fraud by willfully and unlawfully using and employing manipulative and deceptive devices and contrivances, directly and indirectly (i) to employ devices, schemes and artifices to defraud; (ii) to make untrue statements of material fact and omit to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (iii) to engage in acts, practices, and courses of conduct which would and did operate as a fraud and deceit upon members of the investing public, in connection with the purchase and sale of Enron stock and by the use of the instruments of communication in interstate commerce and the mails, in violation of Title 15, United States Code, Sections 78j(b), 78ff and Rule 10b-5 of the SEC, Title 17, Code of Federal Regulations, Section 240.10b-5, and (2) to commit wire fraud by devising a scheme and artifice to defraud and to obtain money and

property by means of materially false and fraudulent pretenses, representations and promises, and, for the purpose of executing such scheme and artifice, to cause interstate wire communications, in violation of Title 18, United States Code, Section 1343.

The Indictment summarizes the alleged schemes to defraud as follows:

From at least April 1999 until May 14, 2001, defendants JOSEPH HIRKO, KEVIN HOWARD, SCOTT YEAGER, REX SHELBY, and MICHAEL KRAUTZ, together with Kenneth Rice, Kevin Harmon and others, engaged in conduct and made false and misleading statements and omitted material information from statements made, all of which were designed to and did deceive the investing public and others about the technological capabilities, value, revenue and business performance of EBS. The defendants executed this scheme by, among other means: (i) causing Enron to issue materially false and misleading press releases; (ii) making and causing others to make materially false and misleading statements to equity analysts and others; (iii) using fraudulent means to generate revenue so that EBS and Enron could appear to reach publicly declared financial targets; and (iv) failing to disclose material adverse information about EBS's poor business performance. During this same time period, defendants HIRKO, YEAGER, and SHELBY sold large quantities of Enron stock, generating millions of dollars for themselves.

The Indictment alleges that several overt acts were committed in furtherance of the conspiracy as follows:

False Press Release – 1999

a. On or about April 19, 1999, HIRKO, YEAGER, SHELBY and others issued and caused to be issued a press release regarding the Enron Intelligent Network.

The 2000 Analyst Conference

b. In or about and between November 1999 and January 2000, both dates being approximate and inclusive, HIRKO, HOWARD, YEAGER, SHELBY, Rice, and others attended meetings and participated in conference calls to plan the scheduled January 20, 2000 analyst conference.

c. On or about November 9, 1999, Rice instructed business consultants that Rice, HIRKO and SHELBY would be responsible for planning the upcoming January 2000 equity analyst conference.

d. On or about January 20, 2000, HIRKO, SHELBY, Rice, and others made false statements about EBS at Enron's equity analyst conference.

False Press Releases – 2000

e. On or about January 31, 2000, HIRKO, YEAGER, SHELBY, Rice, Hannon, and others issued and caused to be issued a press release regarding Sycamore Networks.

f. On or about March 30, 2000, HIRKO, YEAGER, SHELBY, Rice, Hannon, and others issued and caused to be issued a press release regarding VOD Network Solutions.

g. On or about April 11, 2000, HIRKO, YEAGER, SHELBY, Rice, Hannon, and others issued and caused to be issued a press release regarding AtomFilms.

h. On or about May 15, 2000, HIRKO, YEAGER, SHELBY, Rice, Hannon, and others issued and caused to be issued a press release regarding Warpspeed.

The 2001 Analyst Conference

i. In or about January 2001, Rice, Hannon and others attended meetings to plan the scheduled January 25, 2001 analyst conference.

j. On or about January 25, 2001, Rice, Hannon and others made false statements about EBS to equity analysts at Enron's equity analyst conference in Houston, Texas.

Project Braveheart

k. In or about early fall 2000, HOWARD ordered EBS employees to examine the Blockbuster agreement to see if EBS could use it to generate revenue in the fourth quarter of 2000.

l. On or about September 19, 2000, KRAUTZ sent an e-mail message to EBS employees regarding the Blockbuster agreement and the proposed monetization.

m. On or about October 10, 2000, HOWARD sent an e-mail message to an EBS employee discussing formation of the joint venture and the relevant accounting requirements.

n. On or about November 7, 2000, HOWARD caused an EBS employee to send an e-mail message to a representative of nCube proposing formation of the joint venture.

o. On or about November 8, 2000, HOWARD met with an nCube executive to propose formation of the joint venture.

p. On or about November 22, 2000, HOWARD and KRAUTZ participated in a telephone conversation with nCube executives to discuss the proposed joint venture.

q. On or about November 22, 2000, KRAUTZ caused an EBS employee to send to nCube a document that set forth proposed accounting journal entries.

r. On or about December 13, 2000, KRAUTZ sent an e-mail message to Arthur Andersen and Enron employees describing the nature of nCube's investment in the joint venture.

s. On or about February 7, 2001, KRAUTZ sent an e-mail message to an EBS employee regarding possible disclosure of information to Arthur Andersen.

t. On or about February 16, 2001, HOWARD caused $1.7 million to be wired from an Enron bank account in New York to an nCube account at the Bank of America in Beaverton, Oregon.

u. On or about March 1, 2001, KRAUTZ sent an e-mail message to an EBS employee regarding EBS's performance of duties by the joint venture.

v. On or about March 15, 2001, HOWARD sent an e-mail message to EBS employees congratulating them on the Braveheart transaction.

w. In or about April 2001, HOWARD presented an executive summary of the Braveheart transaction to senior EBS executives.

Title 18, United States Code, Section 371, makes it a crime for anyone to conspire with someone else to commit an offense against the laws of the United States.

A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in crime" in which each member becomes the agent of every other member.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant and at least one other person made an agreement to commit the crime of wire fraud or securities fraud, as charged in Count One of the Indictment;

Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in Count One of the Indictment, in order to accomplish some object or purpose of the conspiracy.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy, even though the defendant had not participated before, and even though the defendant played only a minor part.

The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all of the details of the scheme alleged in the indictment were actually agreed upon or carried out. Nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of a conspiracy, does not thereby become a conspirator.

You must determine whether the conspiracy to commit securities fraud or wire fraud as charged in the indictment existed, and, if it did, whether the defendant was a member of it. If you find that the

conspiracy to commit securities fraud or wire fraud as charged did not exist, then you must return a not guilty verdict, even though you find that some other conspiracy existed. If you find that a defendant was not a member of the conspiracy to commit securities fraud or wire fraud as charged in the indictment, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy unrelated to the overall conspiracy charged in the indictment.

To assist you in determining whether there was a conspiracy or agreement to commit the federal offense of securities fraud, I will now instruct you with regard to the nature of the substantive federal crime the defendants are charged with conspiring to commit.

In order to meet its burden of proof on the first element of the charge of conspiracy to commit securities fraud, the government must prove beyond a reasonable doubt that the defendant agreed to commit the crime of securities fraud which has the following three (3) essential elements:

First: That in connection with the purchase or sale of Enron Stock, the defendant did any one or more of the following:

(1) employed a device, scheme, or artifice to defraud as charged in the Indictment; or

(2) made any untrue statement of a material fact, or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under

which they were made, not misleading as charged in the Indictment; or

(3) engaged in an act, practice, or course of conduct that operated, or would operate, as a fraud and deceit on any person as charged in the Indictment;

Second: That the defendant acted willfully, knowingly, and with the intent to defraud; and

Third: That the defendant used, or caused to be used, any means or instrumentality of interstate commerce or of the mails.

"Manipulation" is a term of art in the securities industry and means to intend to defraud an investor by artificially affecting market activity. "Manipulation" includes the deliberate omission of a material fact with the knowledge that the omission makes the facts, as represented, false.

"Deception" is also a term of art in the securities industry and means to defraud by deliberately making an affirmative misstatement of a material fact.

A "device" is simply a contrivance or the result of some plan or design.

As used in this statute in connection with the purchase or sale of a security, then, a "manipulative or deceptive device" means the formation of some contrivance, plan, or design to trick or deceive, either by a deliberate affirmative misstatement of a material fact or a deliberate omission of a material fact.

With respect to the first element that the government must prove beyond a reasonable doubt, it is not necessary for the government to establish all three types of unlawful conduct in connection with the sale or purchase of Enron stock. Any one will be sufficient if you so find, but you must be unanimous as to which type of unlawful conduct you find to have been proven.

A device, scheme, or artifice to defraud is merely a plan for the accomplishment of any objective. Fraud is a general term that embraces all ingenious efforts and means that individuals devise to take advantage of others. A "device, scheme, or artifice to defraud" as used in these instructions, however, means the forming of some contrivance, plan, or design to trick or to deceive in order to obtain money or something of value.

The "in connection with" aspect of this element is satisfied if you find that there was some nexus or relation between the allegedly fraudulent conduct and the sale or purchase of securities. The government must prove beyond a reasonable doubt, therefore, that there were purchases or sales of Enron stock and that the "fraud or deceit" had some relationship to or was connected with these sales or purchases. The government need not show, however, that the defendants, or anyone associated with them, bought or sold the securities in question.

It is no defense to an overall scheme to defraud that the defendant was not involved in the scheme from its inception or played only a minor role, with no contact with the investors and purchasers of the securities in question. Nor is it necessary for you to find that the defendant was the actual seller or offeror of the securities. It is

sufficient if the defendant participated in the scheme or fraudulent conduct that involved the purchase or sale of stock.

By the same token, the government need not prove that the defendant personally made the misrepresentation or that he omitted the material fact. It is sufficient if the government establishes that the defendant caused the statement to be made or the fact to be omitted. With regard to the alleged misrepresentation or omission, you must determine whether the statement was true or false when it was made, and, in the case of an alleged omission whether the omission was misleading.

A statement of opinion or prediction is not a false statement merely because it turns out to be wrong. Criminal liability for such a statement depends upon whether the statement was true or false when made. The falsity of a predictive statement is determined by examining the nature of the prediction--with emphasis on whether the prediction suggested reliability, bespoke caution, was made in good faith, or had a sound factual or historical basis.

If you should decide beyond a reasonable doubt that a particular statement or a particular omission was false or misleading at the time that it was made, then you must determine if the fact stated or omitted was a "material" fact or a "material" omission under the evidence received in this case.

A fact or omission is "material" in the context of the securities markets if there is a substantial likelihood that a reasonable investor would consider that fact or the omission to be significant or

important in making the decision to buy or sell a security. In other words, there must be a substantial likelihood that the fact would have been viewed by the reasonable investor as having significantly altered the total mix of information available.

The securities fraud statute under which Counts Two and Seven of the Indictment are brought is concerned only with such "material" misstatements or such "material" omissions and does not cover minor, or meaningless, or unimportant ones.

It does not matter whether the alleged unlawful conduct was successful or not, or that the defendant profited or received any benefits as a result of the alleged scheme. Success is not an element of the crime charged. However, if you find that the defendant did profit from the alleged scheme, you may consider that in relation to the element of intent, which I will discuss in a moment.

The second element that the government must establish beyond a reasonable doubt is that the defendant participated in the scheme to defraud knowingly, willfully, and with intent to defraud.

"Knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently. "Willfully" means to act knowingly and purposely, with an intent to do something the law forbids, that is to say, with bad purpose either to disobey or to disregard the law. "Intent to defraud" in the context of the securities laws means to act knowingly and with the intent to deceive.

The question of whether a person acted knowingly, willfully, and with intent to defraud is a

question of fact for you to determine, like any other fact question. This question involves one's state of mind. Direct proof of knowledge and fraudulent intent is almost never available. It would be a rare case where it could be shown that a person wrote or stated that as of a given time in the past he committed an act with fraudulent intent. Such direct proof is not required.

The ultimate facts of knowledge and criminal intent, though subjective, may be established by circumstantial evidence, based upon a person's outward manifestations, his words, his conduct, his acts, and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn therefrom.

Since an essential element of the crimes of securities fraud and wire fraud is intent to defraud, it follows that good faith on the part of a defendant is a complete defense to a charge of securities fraud or wire fraud because such an honest or "good faith" belief is inconsistent with a fraudulent intent. Misrepresentations of material fact do not violate the law under which the defendant is charged unless they are made with the intent to defraud. With respect to finding the defendant guilty based on a misrepresentation or omission of material fact, the defendant's good faith belief in the truth of statements made by him or others is a defense, however inaccurate or misleading the statements or omissions turn out to be.

A defendant, however, has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt.

Reliance on the advice of an attorney or accountant may constitute good faith. To decide whether such reliance was in good faith, you may consider whether the defendant sought the advice of a competent attorney or accountant concerning the material fact allegedly omitted or misrepresented, whether the defendant gave his attorney or accountant all the relevant facts known to him at the time, whether the defendant received an opinion from his attorney or accountant, whether the defendant believed the opinion was given in good faith and whether the defendant reasonably followed the opinion.

The government may prove that the defendant acted knowingly and willfully in either of two ways. First, it is sufficient, of course, if the evidence satisfies you beyond a reasonable doubt that the defendant was actually aware he was making or causing a false statement to be made.

Alternatively, the defendant's knowledge may be established by proof that the defendant was aware of a high probability that the statement was false, unless, despite this high probability, the facts show that the defendant actually believed the statement to be true. Thus, you may find that the defendant knew that the statement was false if you conclude beyond a reasonable doubt that he made it with deliberate disregard of whether it was true or false and with a conscious purpose to avoid learning the truth. You, as the trier of fact must assess the evidence to determine to which defendants, if any, this instruction may apply.

If you find beyond a reasonable doubt that the defendant acted with deliberate disregard for the truth, the knowledge requirement would be satisfied

unless the defendant actually believed the statement to be true. This guilty knowledge, however, cannot be established by demonstrating merely negligence or foolishness on the part of the defendant.

To conclude on this element, if you find that the defendant was not a knowing participant in the scheme and lacked the intent to defraud, you should acquit the defendant. On the other hand, if you find that the government has established beyond a reasonable doubt not only the first element, namely, the existence of a scheme to defraud, but also this second element, that the defendant was a knowing participant and acted with intent to defraud, and if the government also establishes the third element, on which I will next instruct you, then you have a sufficient basis upon which to convict the defendant.

The third and final element that the government must prove beyond a reasonable doubt is that the defendant knowingly used, or caused to be used, any means or instrumentality of interstate commerce or of the mails.

The term "interstate commerce" means commerce or travel between one state, territory or possession of the United States and another state, territory or possession of the United States, including the District of Columbia. Commerce includes travel, trade, transportation and communication.

This element of the crime charged may be established if the government proves beyond a reasonable doubt that any means or instrumentality of interstate transportation or communication, including the mails, were in fact, used in the scheme or that such use was reasonably foreseeable.

In this regard, however, it is not necessary for the government to prove that the defendant personally used any means or instrumentality of interstate commerce or the mails, or that such use was contemplated or intended by anyone involved in any scheme. It is sufficient for the government to prove that the defendant set forces in motion which foreseeably resulted in such use.

The matter, material, or information mailed, transported, or communicated need not itself contain a fraudulent representation or request money, but must be a part of the overall scheme.

To assist you in determining whether there was a conspiracy or agreement to commit the federal offense of wire fraud, I will now instruct you with regard to the nature of the substantive federal crime the defendants are charged with conspiring to commit.

In order to meet its burden of proof on the first element of the charge of conspiracy to commit wire fraud, the government must prove beyond a reasonable doubt that the defendant agreed to commit the crime of wire fraud which has the following four (4) essential elements:

First: That the defendant knowingly devised or intended to devise a scheme to defraud as charged in the Indictment;

Second: That the defendant acted with a specific intent to defraud;

Third: That the defendant used or caused another person to use interstate wire communications facilities for

the purpose of carrying out the scheme; and

Fourth: That the scheme to defraud employed false material representations.

A "scheme to defraud" includes any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.

"Knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently. "Intent to defraud" means to act knowingly and with the intent to deceive.

A representation is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation would also be "false" when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud.

A false statement is "material" in the context of a wire fraud charge if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed.

The term "interstate commerce" means commerce or travel between one state, territory or possession of the United States and another state, territory or possession of the United States, including the District of Columbia. Commerce includes travel, trade, transportation and communication.

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the

scheme, or that the material transmitted by wire was itself false or fraudulent, or that the alleged scheme actually succeeded in defrauding anyone, or that the use of interstate wire communications facilities was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proved beyond a reasonable doubt is that the defendant knowingly devised or intended to devise a scheme to defraud that was substantially the same as the one alleged in the indictment, and that the use of the interstate wire communications facilities was closely related to the scheme because the defendant either wired something or caused it to be wired in interstate commerce in an attempt to execute or carry out the scheme. To "cause" interstate wire communications facilities to be used is to do an act with knowledge that the use of the wire facilities will follow in the ordinary course of business or where such use can reasonably be foreseen.

Each separate use of the interstate wire communications facilities in furtherance of a scheme to defraud constitutes a separate offense.

SECURITIES FRAUD

Count Two
(Securities Fraud: January 2000 Analyst Conference)

In Count Two of the Indictment, the government alleges that defendants JOSEPH HIRKO, SCOTT YEAGER, and REX SHELBY, committed securities fraud relating to the January

2000 Analyst Conference. Count Two of the Indictment charges as follows:

On or about January 20, 2000, within the Southern District of Texas and elsewhere, the defendants

JOSEPH HIRKO

SCOTT YEAGER, and

REX SHELBY,

together with others, did willfully and unlawfully use and employ manipulative and deceptive devices and contrivances and directly and indirectly (i) employ devices, schemes and artifices to defraud; (ii) make untrue statements of material facts and omit to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (iii) engage in acts, practices, and courses of conduct which would and did operate as a fraud and deceit upon members of the investing public, in connection with purchases and sales of Enron stock and by the use of instruments of communication in interstate commerce and the mails. In violation of Title 15, United States Code, Sections 78j(b) and Title 17, Code of Federal Regulations, Section 240.10b-5.

Count Seven
(Securities Fraud: Project Braveheart)

In Count Seven of the Indictment, the government alleges that defendants KEVIN HOWARD and MICHAEL KRAUTZ, committed securities fraud relating to Project Braveheart. Count Seven of the Indictment charges as follows:

In or about and between fall 2000 and May 14, 2001, both dates being approximate and inclusive, within the Southern District of Texas and elsewhere, the defendants

KEVIN HOWARD and

MICHAEL KRAUTZ,

together with others, did willfully and unlawfully use and employ manipulative and deceptive devices and contrivances and directly and indirectly (i) employ devices, schemes and artifices to defraud; (ii) make untrue statements of material facts and omit to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (iii) engage in acts, practices, and courses of conduct which would and did operate as a fraud and deceit upon members of the investing public, in connection with purchases and sales of Enron stock and by the use of instruments of communication in interstate commerce and the mails. In violation of Title 15, United States Code, Sections 78j(b) and Title 17, Code of Federal Regulations, Section 240.10b-5.

In order to sustain its burden of proof for the crime of securities fraud as charged against JOSEPH HIRKO, SCOTT YEAGER, and REX SHELBY in Count Two of the Indictment, and as charged against KEVIN HOWARD and MICHAEL KRAUTZ in Count Seven of the Indictment, the government must prove the following three (3) essential elements beyond a reasonable doubt:

First: That in connection with the purchase or sale of Enron Stock, the defendant did any one or more of the following:

(1) employed a device, scheme, or artifice to defraud as charged in the Indictment; or

(2) made any untrue statement of a material fact, or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading as charged in the Indictment; or

(3) engaged in an act, practice, or course of conduct that operated, or would operate, as a fraud and deceit on any person as charged in the Indictment;

Second: That the defendant acted willfully, knowingly, and with the intent to defraud; and

Third: That the defendant used, or caused to be used, any means or instrumentality of interstate commerce or of the mails.

"Manipulation" is a term of art in the securities industry and means to intend to defraud an investor by artificially affecting market activity. "Manipulation" includes the deliberate omission of a material fact with the knowledge that the omission makes the facts, as represented, false.

"Deception" is also a term of art in the securities industry and means to defraud by deliberately making an affirmative misstatement of a material fact.

A "device" is simply a contrivance or the result of some plan or design.

As used in this statute in connection with the purchase or sale of a security, then, a "manipulative or deceptive device" means the formation of some contrivance, plan, or design to trick or deceive, either by a deliberate affirmative misstatement of a material fact or a deliberate omission of a material fact.

With respect to the first element that the government must prove beyond a reasonable doubt, it is not necessary for the government to establish all three types of unlawful conduct in connection with the sale or purchase of Enron stock. Any one will be sufficient if you so find, but you must be unanimous as to which type of unlawful conduct you find to have been proven.

A device, scheme, or artifice to defraud is merely a plan for the accomplishment of any objective. Fraud is a general term that embraces all ingenious efforts and means that individuals devise to take advantage of others. A "device, scheme, or artifice to defraud" as used in these instructions, however, means the forming of some contrivance, plan, or design to trick or to deceive in order to obtain money or something of value.

The "in connection with" aspect of this element is satisfied if you find that there was some nexus or relation between the allegedly fraudulent conduct and the sale or purchase of securities. The government must prove beyond a reasonable doubt, therefore, that there were purchases or sales of Enron stock and that the "fraud or deceit" had some relationship to or was connected with these sales or

purchases. The government need not show, however, that the defendants, or anyone associated with them, bought or sold the securities in question.

It is no defense to an overall scheme to defraud that the defendant was not involved in the scheme from its inception or played only a minor role, with no contact with the investors and purchasers of the securities in question. Nor is it necessary for you to find that the defendant was the actual seller or offeror of the securities. It is sufficient if the defendant participated in the scheme or fraudulent conduct that involved the purchase or sale of stock.

By the same token, the government need not prove that the defendant personally made the misrepresentation or that he omitted the material fact. It is sufficient if the government establishes that the defendant caused the statement to be made or the fact to be omitted. With regard to the alleged misrepresentation or omission, you must determine whether the statement was true or false when it was made, and, in the case of an alleged omission, whether the omission was misleading.

A statement of opinion or prediction is not a false statement merely because it turns out to be wrong. Criminal liability for such a statement depends upon whether the statement was true or false when made. The falsity of a predictive statement is determined by examining the nature of the prediction, with emphasis on whether the prediction suggested reliability, bespoke caution, was made in good faith, or had a sound factual or historical basis.

If you should decide beyond a reasonable doubt that a particular statement or a particular omission was false or misleading at the time that it was made, then you must determine if the fact stated or omitted was a "material" fact or a "material" omission under the evidence received in this case.

A fact or omission is "material" in the context of the securities markets if there is a substantial likelihood that a reasonable investor would consider that fact or the omission to be significant or important in making the decision to buy or sell a security. In other words, there must be a substantial likelihood that the fact would have been viewed by the reasonable investor as having significantly altered the total mix of information available.

The securities fraud statute under which Counts Two and Seven of the Indictment are brought is concerned only with such "material" misstatements or such "material" omissions and does not cover minor, or meaningless, or unimportant ones.

It does not matter whether the alleged unlawful conduct was successful or not, or that the defendant profited or received any benefits as a result of the alleged scheme. Success is not an element of the crime charged. However, if you find that the defendant did profit from the alleged scheme, you may consider that in relation to the element of intent, which I will discuss in a moment.

The second element that the government must establish beyond a reasonable doubt is that the

defendant participated in the scheme to defraud knowingly, willfully, and with intent to defraud.

"Knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently. "Willfully" means to act knowingly and purposely, with an intent to do something the law forbids, that is to say, with bad purpose either to disobey or to disregard the law. "Intent to defraud" in the context of the securities laws means to act knowingly and with the intent to deceive.

The question of whether a person acted knowingly, willfully, and with intent to defraud is a question of fact for you to determine, like any other fact question. This question involves one's state of mind. Direct proof of knowledge and fraudulent intent is almost never available. It would be a rare case where it could be shown that a person wrote or stated that as of a given time in the past he committed an act with fraudulent intent. Such direct proof is not required.

The ultimate facts of knowledge and criminal intent, though subjective, may be established by circumstantial evidence, based upon a person's outward manifestations, his words, his conduct, his acts, and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from therefrom.

Since an essential element of the crime charged is intent to defraud, it follows that good faith on the part of a defendant is a complete defense to a charge of securities fraud, because such an honest or "good faith" belief is inconsistent with a fraudulent intent. Misrepresentations of material fact do not violate the law under which the

defendant is charged unless they are made with the intent to defraud. With respect to finding the defendant guilty based on a misrepresentation or omission of material fact, the defendant's good faith belief in the truth of statements made by him or others is a defense however inaccurate or misleading the statements or omissions turn out to be.

A defendant, however, has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt.

Reliance on the advice of an attorney or accountant may constitute good faith. To decide whether such reliance was in good faith, you may consider whether the defendant sought the advice of a competent attorney or accountant concerning the material fact allegedly omitted or misrepresented, whether the defendant gave his attorney or accountant all the relevant facts known to him at the time, whether the defendant received an opinion from his attorney or accountant, whether the defendant believed the opinion was given in good faith, and whether the defendant reasonably followed the opinion.

The government may prove that the defendant acted knowingly and willfully in either of two ways. First, it is sufficient, of course, if the evidence satisfies you beyond a reasonable doubt that the defendant was actually aware he was making or causing a false statement to be made.

Alternatively, the defendant's knowledge may be established by proof that the defendant was aware of a high probability that the statement was

false, unless, despite this high probability, the facts show that the defendant actually believed the statement to be true. Thus, you may find that the defendant knew that the statement was false if you conclude beyond a reasonable doubt that he made it with deliberate disregard of whether it was true or false, and with a conscious purpose to avoid learning the truth. You as the trier of fact must assess the evidence to determine to which defendants, if any, this instruction may apply.

If you find beyond a reasonable doubt that the defendant acted with deliberate disregard for the truth, the knowledge requirement would be satisfied unless the defendant actually believed the statement to be true. This guilty knowledge, however, cannot be established by demonstrating merely negligence or foolishness on the part of the defendant.

To conclude on this element, if you find that the defendant was not a knowing participant in the scheme and lacked the intent to defraud, you should acquit the defendant. On the other hand, if you find that the government has established beyond a reasonable doubt not only the first element, namely, the existence of a scheme to defraud, but also this second element, that the defendant was a knowing participant and acted with intent to defraud, and if the government also establishes the third element, on which I will next instruct you, then you have a sufficient basis upon which to convict the defendant.

The third and final element that the government must prove beyond a reasonable doubt is that the defendant knowingly used, or caused to be used, any means or instrumentality of interstate commerce or of the mails.

The term "interstate commerce" means commerce or travel between one state, territory or possession of the United States and another state, territory or possession of the United States, including the District of Columbia. Commerce includes travel, trade, transportation and communication.

This element of the crime charged may be established if the government proves beyond a reasonable doubt that any means or instrumentality of interstate transportation or communication, including the mails, were, in fact, used in the scheme or that such use was reasonably foreseeable.

In this regard, however, it is not necessary for the government to prove that the defendant personally used any means or instrumentality of interstate commerce or the mails, or that such use was contemplated or intended by anyone involved in any scheme. It is sufficient for the government to prove that the defendant set forces in motion which foreseeably resulted in such use.

The matter, material, or information mailed, transported, or communicated need not itself contain a fraudulent representation or request money, but must be a part of the overall scheme.

WIRE FRAUD

Counts Three through Six
(Wire Fraud: April 1999 to July 2000)

In Counts Three through Six of the Indictment, the government alleges that defendants JOSEPH HIRKO, SCOTT YEAGER, and REX SHELBY committed wire fraud in the year 2000. The Indictment charges as follows:

On or about the dates specified below, within the Southern District of Texas and elsewhere, the defendants

JOSEPH HIRKO,

SCOTT YEAGER and

REX SHELBY,

together with others, having devised a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises, did for the purpose of executing such scheme and artifice transmit and cause to be transmitted by means of wire communication in interstate commerce writings, signs, signals, pictures and sounds, as follows:

Count	Date	From	To	Description
3	1/31/00	New York, NY	Nationwide	Press Release
4	3/30/00	New York, NY	Nationwide	Press Release

5	4/11/00	New York, NY	Nationwide	Press Release
6	5/15/00	New York, NY	Nationwide	Press Release

In violation of Title 18, United States Code, Sections 1343, 2 and 3551 et seq.

Counts Eight through Twelve, Fourteen through Nineteen, and Twenty-One through Twenty-Two

(Wire Fraud: Project Braveheart)

In Counts Eight through Twelve, Fourteen through Nineteen, and Twenty-One through Twenty-Two of the Indictment, the government alleges that defendants KEVIN HOWARD and MICHAEL KRAUTZ committed wire fraud relating to Project Braveheart. The Indictment charges as follows:

On or about the dates specified below, within the Southern District of Texas and elsewhere, the defendants

KEVIN HOWARD and

MICHAEL KRAUTZ,

together with others, having devised a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises, did for the purpose of executing such scheme and artifice transmit and cause to be transmitted by means of wire communication in interstate commerce

writings, signs, signals, pictures and sounds, as follows:

Count	Date	From	To	Description
8	11/07/00	Houston, TX	California	e-mail
9	11/17/00	Houston, TX	Oregon	e-mail
10	11/22/00	Houston, TX	Oregon	e-mail
11	11/22/00	Houston, TX	Oregon	e-mail
12	11/22/00	Houston, TX	Oregon	telephone call
14	12/08/00	Houston, TX	Oregon	e-mail
15	12/20/00	Houston, TX	Oregon	e-mail
16	1/24/01	Oregon	Houston, TX	e-mail
17	1/26/01	Houston, TX	Oregon	e-mail
18	1/26/01	Oregon	Houston, TX	e-mail
19	2/08/01	Houston, TX	Oregon	e-mail

21	2/16/01	Houston, TX	Oregon	e-mail
22	2/16/01	Houston, TX	Oregon	e-mail

In violation of Title 18, United States Code, Sections 1343, 2 and 3551 et seq.

Title 18, United States Code, Section 1343, makes it a crime for anyone to use interstate wire communications facilities in carrying out a scheme to defraud.

For you to find a defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly devised or intended to devise a scheme to defraud, as described in the indictment;

Second: That the defendant acted with a specific intent to defraud;

Third: That the defendant used or caused another person to use interstate wire communications facilities for the purpose of carrying out the scheme; and

Fourth: That the scheme to defraud employed false material representations.

A "scheme to defraud" includes any scheme to deprive another of money or property by means of

false or fraudulent pretenses, representations, or promises.

"Knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently. "Intent to defraud" means to act knowingly and with the intent to deceive.

A representation is "false" if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation would also be "false" when it constitutes a half truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud.

A false statement is "material" in the context of a wire fraud charge if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed.

The term "interstate commerce" means commerce or travel between one state, territory or possession of the United States and another state, territory or possession of the United States, including the District of Columbia. Commerce includes travel, trade, transportation and communication.

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme, or that the material transmitted by wire was itself false or fraudulent, or that the alleged scheme actually succeeded in defrauding anyone, or that the use of interstate wire communications facilities was intended as the specific or exclusive means of accomplishing the alleged fraud.

What must be proved beyond a reasonable doubt is that the defendant knowingly devised or intended to devise a scheme to defraud that was substantially the same as the one alleged in the indictment, and that the use of the interstate wire communications facilities was closely related to the scheme because the defendant either wired something or caused it to be wired in interstate commerce in an attempt to execute or carry out the scheme. To "cause" interstate wire communications facilities to be used is to do an act with knowledge that the use of the wire facilities will follow in the ordinary course of business or where such use can reasonably be foreseen.

Each separate use of the interstate wire communications facilities in furtherance of a scheme to defraud constitutes a separate offense.

INSIDER TRADING

Counts Twenty-Three through Twenty-Six (2000 Insider Trading: JOSEPH HIRKO)

Counts Twenty-Three through Twenty-Six of the Indictment allege that defendant JOSEPH HIRKO engaged in insider trading, a form of securities fraud, in the year 2000. The Indictment charges as follows:

On or about the dates set forth below, within the Southern District of Texas and elsewhere, the defendant

JOSEPH HIRKO

knowingly and willfully used and employed manipulative and deceptive devices and

contrivances, by use of means and instrumentalities of interstate commerce, in violation of Rule 10b-5 of the Rules and Regulations of the United States Securities and Exchange Commission (Title 17, Code of Federal Regulations, Section 240.10b-5) in that he engaged in acts, practices, and courses of business which would operate as a fraud and deceit upon members of the investing public in connection with the purchase or sale of securities, in violation of Title 15, United States Code, Sections 78j(b) and 78ff. Specifically, while in possession of material, non-public information regarding the technological capabilities, value, revenue, and business performance of Enron Communications, Inc. and Enron Broadband Services, Hirko sold shares of Enron stock as follows, generating gross proceeds of $35,167,761.41.

Count	Date	Shares	Sale Price	Gross Proceeds
23	2/18/00	93,187	$69.3852	$6,465,798.63
24	4/20/00	130,650	$70.6972	$9,236,589.20
25	5/11/00	192,000	$78.0496	$14,985,523.20
26	5/12/00	58,000	$77.2388	$4,479,850.40

Counts Twenty-Seven through Forty-Six
(Insider Trading: SCOTT YEAGER)

Counts Twenty-Seven through Forty-Six of the Indictment allege that defendant SCOTT YEAGER engaged in insider trading, a form of securities fraud. The Indictment charges as follows:

On or about the dates set forth below, within the Southern District of Texas and elsewhere, the defendant

SCOTT YEAGER

knowingly and willfully used and employed manipulative and deceptive devices and contrivances, by use of means and instrumentalities of interstate commerce, in violation of Rule 10b-5 of the Rules and Regulations of the United States Securities and Exchange Commission (Title 17, Code of Federal Regulations, Section 240.10b-5) in that he engaged in acts, practices, and courses of business which would operate as a fraud and deceit upon members of the investing public in connection with the purchase or sale of securities, in violation of Title 15, United States Code, Sections 78j(b) and 78ff. Specifically, while in possession of material, non-public information regarding the technological capabilities, value, revenue, and business performance of Enron Communications, Inc. and Enron Broadband Services, Yeager sold shares of Enron stock as follows, generating gross proceeds of $54,282,923.89.

Count	Date	Shares	Sale Price	Gross Proceeds
27	1/21/00	100,000	$72.0689	$7,206,890.00
28	3/22/00	25,000	$75.00	$1,875,000.00
29	4/12/00	10,000	$73.7563	$737,563.00
30	5/10/00	10,000	$75.00	$750,000.00
31	5/11/00	10,000	$77.2650	$772,650.00

32	6/8/00	10,000	$72.00	$720,000.00
33	6/9/00	10,000	$74.00	$740,000.00
34	7/24/00	50,000	$74.8750	$3,743,750.00
35	7/27/00	25,000	$74.00	$1,850,000.00
36	7/27/00	25,000	$74.95	$ 1,873,750.00
37	7/27/00	25,000	$74.5315	$1,863,287.50
38	7/27/00	50,000	$75.8215	$3,791,075.00
39	7/27/00	50,000	$76.9669	$3,848,345.00
40	8/2/00	50,000	$77.8875	$3,894,375.00
41	8/7/00	80,500	$79.8633	$6,428,995.65
42	8/8/00	69,500	$81.0598	$5,633,656.010
43	8/14/00	25,000	$83.00	$2,075,000.00
44	8/16/00	25,000	$84.0018	$2,100,045.00
45	8/17/00	25,000	$85.35	$2,133,750.00
46	8/23/00	25,000	$89.7625	$2,244,062.50

Counts Forty-Seven through Fifty-Four
(Insider Trading: REX SHELBY)

Counts Forty-Seven through Fifty-Four of the Indictment allege that defendant REX SHELBY engaged in insider trading, a form of securities fraud. The Indictment charges as follows:

On or about the dates set forth below, within the Southern District of Texas and elsewhere, the defendant

REX SHELBY

knowingly and willfully used and employed manipulative and deceptive devices and contrivances, by use of means and instrumentalities of interstate commerce, in violation of Rule 10b-5 of the Rules and Regulations of the United States Securities and Exchange Commission (Title 17, Code of Federal Regulations, Section 240.10b-5) in that he engaged in acts, practices, and courses of business which would operate as a fraud and deceit upon members of the investing public in connection with the purchase or sale of securities, in violation of Title 15, United States Code, Sections 78j(b) and 78ff. Specifically, while in possession of material, non-public information regarding the technological capabilities, value, revenue, and business performance of Enron Communications, Inc. and Enron Broadband Services, Shelby sold shares of Enron stock as follows, generating gross proceeds of $35,230,923.89.

Count	Date	Shares	Sale Price	Gross Proceeds
47	1/21/00	75,000	$72.00	$5,400,000.00
48	1/21/00	75,000	$70.25	$5,268,750.00
49	2/1/00	50,000	$66.5469	$3,327,750.00
50	3/22/00	47,500	$75.00	$3,562,500.00
51	6/26/00	207,615	$70.8199	$14,703,273.54

52	6/27/00	1,450	$70.00	$101,500.00
53	6/28/00	39,665	$70.00	$2,776,550.00
54	7/19/00	1,230	$73.2144	$90,053.71

Counts One Hundred Seventy-Two through One Hundred Seventy-Four
(2001 Insider Trading: JOSEPH HIRKO)

Counts One Hundred Seventy-Two through One Hundred Seventy-Four allege that defendant JOSEPH HIRKO engaged in insider trading, a form of securities fraud, in the year 2001. The Indictment charges as follows:

On or about the dates set forth below, within the Southern District of Texas and elsewhere, the defendant

JOSEPH HIRKO

knowingly and willfully used and employed manipulative and deceptive devices and contrivances, by use of means and instrumentalities of interstate commerce, in violation of Rule 10b-5 of the Rules and Regulations of the United States Securities and Exchange Commission (Title 17, Code of Federal Regulations, Section 240.10b-5) in that he engaged in acts, practices, and courses of business which would operate as a fraud and deceit upon members of the investing public in connection with the purchase or sale of securities, in violation of Title 15, United States Code, Sections 78j (b) and 78ff. Specifically, while in possession of material, non-public information regarding the technological capabilities, value, revenue, and business

performance of Enron Communications, Inc. and Enron Broadband Services, Hirko sold shares of Enron stock as follows, generating gross proceeds of $35,212,724.00.

Count	Date	Shares	Sale Price	Gross Proceeds
172	1/23/01	100,000	$78.4010	$7,840,100.00
173	1/25/01	100,000	$81.0000	$8,100,000.00
174	1/26/01	235,032	$82.0000	$19,272,624.00

In order to sustain its burden of proof for the crime of insider trading securities fraud as charged against defendant JOSEPH HIRKO in Counts 23-26 and Counts 172-174, defendant SCOTT YEAGER in Counts 27-46, and defendant REX SHELBY in Counts 47-54 of the Indictment, the government must prove the following three (3) essential elements beyond a reasonable doubt:

First: That in connection with the purchase or sale of Enron Stock, the defendant did any one or more of the following:

(1) employed a device, scheme, or artifice to defraud as detailed in the indictment; or

(2) made any untrue statement of a material fact, or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not

misleading as detailed in the indictment; or

(3) engaged in an act, practice, or course of conduct that operated, or would operate, as a fraud and deceit on any person as detailed in the indictment.

Second: That the defendant acted willfully, knowingly, and with the intent to defraud; and

Third: That the defendant used, or caused to be used, any means or instrumentality of interstate commerce, or of the mails.

Insider trading is a form of securities fraud. Thus, all of the instructions I previously gave you relating to the elements of a securities fraud offense are applicable in your consideration of the charges of insider trading securities fraud. I will now give you some additional instructions to aid in your consideration of the charges of insider trading securities fraud.

The "device, scheme, or artifice" that the government alleges the defendant employed in this case is known as insider trading. An insider is one who comes into possession of material, confidential, non-public information about a stock by virtue of a business relationship which involves trust and confidence. When a person has such "inside information" and his position of trust or confidence prevents him from disclosing that information, the law forbids him from using that inside information in buying or selling the securities in question.

This rule has developed because of the basic unfairness of allowing those with access to material information intended to be used only for corporate purposes to benefit personally from the use of such information.

Persons who are corporate officers, directors and controlling shareholders are considered "insiders" for purposes of this rule. In addition, a person will be forbidden to buy or sell securities of a company if the government establishes that he had assumed a special confidential relationship affording the defendant access to material confidential information intended to be available only for a corporate purpose and not for his personal benefit. Thus, it is the confidential nature of the relationship which determines whether a person is an insider, and not merely the title he holds.

To the extent that you find that some of the work done by a defendant was performed as a consultant, if you find that the defendant became involved in the conduct of the business of the corporation, and gained access to material confidential information while acting in that capacity, you may find that he was an "insider" and therefore owed a duty to the corporation and its shareholders not to benefit from the use of the material confidential information.

In considering this element you must also determine whether the confidential information in question is a material fact. A fact or omission is "material" in the context of the securities markets if there is a substantial likelihood that a reasonable investor would consider that fact or the omission to be significant or important in making the decision to buy or sell a security. In other words, there must be

a substantial likelihood that the fact would have been viewed by the reasonable investor as having significantly altered the total mix of information available.

Information is "non-public" if it is not available to the public through sources such as press releases, SEC filings, trade publications, analysts' reports, newspapers, magazines, television, radio, or word of mouth. It is important to recognize, however, that the fact that information has not appeared in a newspaper or in another widely available public medium is not alone decisive of whether the information is non-public.

A person "uses" material, non-public information in connection with a stock purchase or sale if that information is a factor in his decision to purchase the stock. Thus, in order for you to find the defendant guilty on the insider trading counts of the indictment, the government must prove that the defendant sold Enron stock because of material, non-public information that he knowingly possessed. It is not sufficient that the government proves that the defendant sold Enron stock while knowingly in possession of the material, non-public information. Rather, the government must prove beyond a reasonable doubt that the defendant in fact used that material, non-public information in his purchase or sale of Enron stock. However, the government need not prove that the defendant sold Enron stock solely because of the material, non-public information. It is enough if the government proves that such inside information was a factor in the defendant's decision to sell Enron stock.

MONEY LAUNDERING

Counts Fifty-Five through Sixty-Six
(2000 Money Laundering: JOSEPH HIRKO)

Counts Fifty-Five through Sixty-Six of the Indictment charge as follows:

On or about the dates listed in the chart below, within the Southern District of Texas and elsewhere, the defendant

JOSEPH HIRKO

did knowingly engage and attempt to engage, and did aid, abet, counsel, command, induce, procure and cause others to engage and attempt to engage in the following monetary transactions by, through or to a financial institution, affecting interstate commerce, in criminally derived property of a value greater than $10,000, to wit, the following transfers of funds generated through wire fraud and fraud in the sale of securities, which funds were derived from a specified unlawful activity, that is, wire fraud in violation of Title 18, United State Code, Section 1343, and fraud in the sale of securities in violation of Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5.

Count	Date	Transaction
55	3/31/2000	Transfer of $224,500 from Paine Webber account no. HS 72449 to purchase 8,087.176 units of Pilgrim International Core Growth Fund Class A

56	3/31/2000	Transfer of $224.500 from Paine Webber account no. HS 72449 to purchase 13,944.099 units of Pilgrim International Value Class A
57	3/31/2000	Transfer of $224,500 from Paine Webber account no. HS 72449 to purchase 7,389.73 units of Pilgrim Growth & Value Class A
58	3/31/2000	Transfer of $224,500 from Paine Webber account no. HS 72449 to purchase 5,182.36 units of Federated Intl Small Company Fd A
59	4/4/2000	Transfer of $336,794 from Paine Webber account no. HS 72449 to Paine Webber account no. HS E5704
60	4/4/2000	Transfer of $336,794 from Paine Webber account no. HS 72449 to Paine Webber account no. HS E5705
61	4/4/2000	Transfer of $336,794 from Paine Webber account no. HS 72449 to Paine Webber account no. HS E5697
62	4/7/2000	Transfer of $96,500 from Paine Webber account no. HS 72449 to Paine Webber account no. HS E5697

63	4/26/2000	Transfer of $2,860,716.53 from Paine Webber account no. HS 72449, by check no. HS76782 to Bank of America account no. 28041-15626
64	5/17/2000	Transfer of $3,674,635.99 from Paine Webber account no. HS 72449, by check no. HS78811 to Bank of America account no. 28041-15626
65	5/18/2000	Transfer of $1,087,216.54 from Paine Webber account no. HS 72449, by check no. HS78858 to Bank of America account no. 28041-15626
66	9/21/2000	Transfer of $234,068.43, as part of a larger transfer of $301,113.30 from Paine Webber account no. HM 01298 to Paine Webber account no. HM 0292

In violation of Title 18, United States Code, Sections 1957, 2 and 3551 et seq.

Counts Sixty-Seven through Seventy-Three; Eighty through One Hundred Forty; One Hundred Forty-Two; One Hundred Forty-Four through One Hundred Forty-Five; One Hundred Forty Seven through One Hundred Sixty-One; One Hundred Sixty-Three through One Hundred Sixty-Five (Money Laundering: SCOTT YEAGER)

Counts Sixty-Seven through One Hundred Sixty-Five of the Indictment charge as follows: On or about the dates listed in the chart below, within the Southern District of Texas and elsewhere, the defendant

SCOTT YEAGER

did knowingly engage and attempt to engage, and did aid, abet, counsel, command, induce, procure and cause others to engage and attempt to engage in the following monetary transactions by, through or to a financial institution, affecting interstate commerce, in criminally derived property of a value greater than $10,000, to wit, the following transfers of funds generated through wire fraud and fraud in the sale of securities, which funds were derived from a specified unlawful activity, that is, wire fraud in violation of Title 18, United State Code, Section 1343, and fraud in the sale of securities in violation of Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5.

Count	Date	Transaction
67	2/7/2000	Transfer of $250,000 by federal funds wire from Paine Webber Account no. HS E2608 to Salomon

		Smith Barney Account no. 414-4317510106
68	3/15/2000	Transfer of $1,000,000, by federal funds wire, from Paine Webber Account no. HS E2608 to EOL Partnership
69	4/5/2000	Transfer of $100,000 by federal funds wire from Paine Webber Account no. HS E2608 to BancFirst - Insured Escrow Service
70	4/10/2000	Transfer of $400,000 by federal funds wire from Paine Webber Account no. HS E2608 to Merrill Lynch account no. 230-63517
71	6/14/2000	Payment of $250,000.00 from Paine Webber Account no. HS E2608 to purchase 10 shares of Dreyfus Muni Income Inc.
72	6/14/2000	Payment of $750,000.00 from Paine Webber Account no. HS E2608 to purchase 30 shares of Muniyield Fund Inc
73	6/16/2000	Transfer of $425,000 by federal funds wire from Paine Webber Account no. HS E2608 to Merrill

		Lynch Account no. 230-63517
80	8/21/2000	Transfer of $50,000 by check number 109, payable to FSY Consultants, from Paine Webber Account no. HS E2608
81	8/23/2000	Payment of $2,000,000.00 from Paine Webber Account no. HS E2608 to purchase 2,000,000 units of Manulife North American
82	8/25/2000	Payment of $100,143.39 from Paine Webber Account no. HS E2608 to purchase 100,000 units of Gulf Coast Wtr Tex W/Sys Bonds
83	8/25/2000	Payment of $103,454.50 from Paine Webber Account no. HS E2608 to purchase 100,000 units of Western Wash Univ Wash Rev Bonds
84	8/25/2000	Payment of $105,936.25 from Paine Webber Account no. HS E2608 to purchase 105,000 units of Liberal Kans G.O. Bonds
85	8/25/2000	Payment of $106,299.38 from Paine Webber

		Account no. HS E2608 to purchase 105,000 units of West Vy City Mun Bldg Rev Bonds
86	8/25/2000	Payment of $144,743.33 from Paine Webber Account no. HS E2608 to purchase 150,000 units of Kansas City Mo Mac Rev Bonds
87	8/25/2000	Payment of $146,644.23 from Paine Webber Account no. HS E2608 to purchase 140,000 units of Utah St Brd Rgnts/R Crss Rev Bonds
88	8/25/2000	Payment of $160,973.55 from Paine Webber Account no. HS E2608 to purchase 155,000 units of Childress Tex Ctfs Oblig Bonds
89	8/25/2000	Payment of $197,031.39 from Paine Webber Account no. HS E2608 to purchase 200,000 units of Allen Tex Indpt Sch Dist Bonds
90	8/25/2000	Payment of $216,271.83 from Paine Webber Account no. HS E2608 to purchase 200,000 units of

		Decatur Ill Fgic Bonds
91	8/25/2000	Payment of $231,644.70 from Paine Webber Account no. HS E2608 to purchase 220,000 units of Westmoreland Cnty Pa Rev Bonds
92	8/25/2000	Payment of $254,735.36 from Paine Webber Account no. HS E2608 to purchase 245,000 units of Tarrant Cnty Tx Hlth Fac Dev Corp Bonds
93	8/25/2000	Payment of $258,130.75 from Paine Webber Account no. HS E2608 to purchase 250,000 units of Colorado Hlth Fac Bonds
94	8/28/2000	Transfer of $15,677.30 by check number 111, payable to American Express, from Paine Webber Account no. HS E2608
95	8/30/2000	Payment of $101,973.28 from Paine Webber Account no. HS E2608 to purchase 100,000 units of Harlandale ISD Texas Ref Sch Bldg Bonds
96	8/30/2000	Payment of $256,907.94 from Paine Webber Account no. HS E2608 to

		purchase 235,000 units of Harlandale ISD Texas Ref Sch Bldg Bonds
97	8/31/2000	Payment of $199,850.33 from Paine Webber Account no. HS E2608 to purchase 200,000 units of Johnson City Usd Ks G.O. Bldg Bonds
98	9/5/2000	Transfer of $50,000 by check number 112, payable to FSY Consultants, from Paine Webber Account no. HS E2608
99	9/5/2000	Transfer of $68,041.11 by check number 113, payable to Provident Bank, from Paine Webber Account no. HS E2608
100	9/6/2000	Payment of $207,022.33 from Paine Webber Account no. HS E2608 to purchase 200,000 units of Oconto Falls Wis Pub Sch Dist Bonds
101	9/6/2000	Transfer of $19,267.45 by check number 115, payable to American Express, from Paine Webber Account no. HS E2608
102	9/12/2000	Transfer of $210,000 by federal funds wire from

		Paine Webber Account no. HS E2608 to Gees Garrett
103	9/13/2000	Payment of $1,500,000.00 from Paine Webber Account no. HS E2608 to purchase 60 shares of Blackrock Inv Quality Muni Trust
104	9/19/2000	Payment of $161,705.30 from Paine Webber Account no. HM E0123 to purchase 160,000 units of Collin Cnty Tx Ultd Tax bonds
105	10/5/2000	Payment of $230,219.59 from Paine Webber Account no. HM E0123 to purchase 225,000 units of US Treasury Notes
106	10/5/2000	Payment of $228,263.23 from Paine Webber Account no. HM E0123 to purchase 225,000 units of US Treasury Notes
107	10/5/2000	Payment of $100,863.89 from Paine Webber Account no. HM E0123 to purchase 100,000 units of US Treasury Notes
108	10/5/2000	Payment of $103,393.34 from Paine Webber Account no. HM E0123 to

		purchase 100,000 units of US Treasury Notes
109	10/5/2000	Payment of $225,600.25 from Paine Webber Account no. HM E0123 to purchase 225,000 units of US Treasury Notes
110	10/5/2000	Payment of $100,592.38 from Paine Webber Account no. HM E0123 to purchase 100,000 units of US Treasury Notes
111	10/5/2000	Payment of $75,751.65 from Paine Webber Account no. HM E0123 to purchase 75,000 units of US Treasury Notes
112	10/5/2000	Payment of $154,103.92 from Paine Webber Account no. HM E0123 to purchase 150,000 units of US Treasury Notes
113	10/12/2000	Payment of $95,035.87 from Paine Webber Account no. HM E0123 to purchase $95,000 certificate of deposit from IBJ Whitehall Bk & Trst
114	10/17/2000	Transfer of $67,837.92 by check number 124, payable to Provident Bank, from Paine Webber Account no.

		HM E0123
115	10/19/2000	Transfer of $232,605.25 by federal funds wire from Paine Webber Account no. HM E0123 to Garrett Aviation Services
116	10/25/2000	Payment of $96,837.72 from Paine Webber Account no. HM E0123 to purchase 100,000 units of Aldine Tex Isd bonds
117	10/25/2000	Payment of $99,718.25 from Paine Webber Account no. HM E0123 to purchase 100,000 units of Chattanooga Tn Elect Sys Rev bonds
118	10/25/2000	Payment of $99,543.64 from Paine Webber Account no. HM E0123 to purchase 100,000 units of Harris Cnty Tex Rfdg Toll Rev bonds
119	10/25/2000	Payment of $103,231.00 from Paine Webber Account no. HM E0123 to purchase 100,000 units of Lake Co IL Cons S/D # 50 bonds
120	10/25/2000	Payment of $97,652.50 from Paine Webber Account no. HM E0123 to

		purchase 100,000 units of St Louis Mo Cop Cap Impt bonds
121	10/25/2000	Payment of $102,947.00 from Paine Webber Account no. HM E0123 to purchase 100,000 units of Socorro Tex Indpt Sch bonds
122	10/25/2000	Payment of $94,952.50 from Paine Webber Account no. HM E0123 to purchase 100,000 units of Travis Cnty Tex bonds
123	10/26/2000	Payment of $107,819.97 from Paine Webber Account no. HM E0123 to purchase 100,000 units of Allen Cnty Ind Jail Bldg Corp Rev bonds
124	10/27/2000	Payment of $94,515.50 from Paine Webber Account no. HM E0123 to purchase 100,000 units of Travis Cnty Tex bonds
125	11/2/2000	Transfer of $150,000 by federal funds wire from Paine Webber Account no. HM E0123 to Merrill Lynch account no. 230-6351
126	11/6/2000	Payment of $178,054.50

		from Paine Webber Account no. HM E0123 to purchase 30,000 units of Enron Corp call options
127	11/7/2000	Transfer of $536,575.18 by federal funds wire from Paine Webber Account no. HM E0123 to Chase Manhattan Mortgage
128	11/7/2000	Payment of $95,096.67 from Paine Webber Account no. HM E0123 to purchase $95,000 certificate of deposit from BSB Bank & Trust
129	11/13/2000	Transfer of $150,000 from Paine Webber account no. HM E0123 to Paine Webber account no. HM 80178-0100
130	11/13/2000	Transfer of $700,000 from Paine Webber account no. HM E0123 to Paine Webber account no. HM 80179-8100
131	11/13/2000	Transfer of $500,000 from Paine Webber account no. HM E0123 to Paine Webber account no. HM 80180-1100
132	11/13/2000	Transfer of $500,000 from Paine Webber account no.

		HM E0123 to Paine Webber account no. HM 80181-0100
133	11/13/2000	Transfer of $150,000 from Paine Webber account no. HM E0123 to Paine Webber account no. HM 80182-8100
134	11/14/2000	Payment of $100,410.83 from Paine Webber Account no. HM E0123 to purchase 100,000 units of McKinney Texas Wtrwks & Rev bonds
135	11/27/2000	Transfer of $200,000 by federal funds wire from Paine Webber Account no. HM E0123 ES to Merrill Lynch account no. 230-63517
136	12/5/2000	Transfer of $100,000 from Paine Webber account no. HM E0123 to Paine Webber account no. HM 80178-0100
137	12/5/2000	Transfer of $100,000 from Paine Webber account no. HM E0123 to Paine Webber account no. HM 80179-8100
138	12/5/2000	Transfer of $100,000 from Paine Webber account no.

		HM E0123 to Paine Webber account no. HM 80180-1100
139	12/5/2000	Transfer of $100,000 from Paine Webber account no. HM E0123 to Paine Webber account no. HM 80181-0100
140	12/5/2000	Transfer of $100,000 from Paine Webber account no. HM E0123 to Paine Webber account no. HM 80182-8100
142	12/18/2000	Payment of $95,204.58 from Paine Webber Account no. HM E0123 to purchase $95,000 certificate of deposit from Peoples Heritage Bank
144	12/29/2000	Transfer of $150,000 by check number 156, payable to FYI Realty, from Paine Webber Account no. HM E0123
145	12/29/2000	Transfer of $350,000 by check number 157, payable to FSY Consultants, from Paine Webber Account no. HM E0123

147	1/11/2001	Transfer of $33,671.91 by check number 161, payable to American Express, from Paine Webber Account no. HM E0123
148	1/14/2001	Transfer of $11,347.50 by check number 163, payable to La Bandera Ranch, from Paine Webber Account no. HM E0123
149	04/23/2001	Payment of $244,198.17 from Paine Webber Account no. HM E0123 to purchase 255,000 units of Allen Tex Indpt Sch Dist bonds
150	04/23/2001	Payment of $99,816.06 from Paine Webber Account no. HM E0123 to purchase 100,000 units of Decatur Tx Isd Ult Sch Bldg bonds
151	04/23/2001	Payment of $100,100.67 from Paine Webber Account no. HM E0123 to purchase 100,000 units of Barton Cnty Kans USD bonds
152	04/23/2001	Payment of $99,613.22 from Paine Webber Account no. HM E0123 to

		purchase 100,000 units of Araphoe Libr Dist Colo C.O.P. Rev bonds
153	04/23/2001	Payment of $99,316.06 from Paine Webber Account no. HM E0123 to purchase 100,000 units of Hurst-Euless Bedford Tex bonds
154	04/23/2001	Payment of $110,007.92 from Paine Webber Account no. HM E0123 to purchase 110,000 units of Mansfield Texas Ww/Ss Rv bonds
155	04/23/2001	Payment of $119,692.69 from Paine Webber Account no. HM E0123 to purchase 125,000 units of Maricopa Cnty Ariz Sch bonds
156	05/02/2001	Payment of $129,341.68 from Paine Webber Account no. HM E0123 to purchase 110,000 units of Pflugerville Tex Cap Gty bonds
157	05/03/2001	Payment of $98,885.78 from Paine Webber Account no. HM E0123 to purchase 100,000 units of

		West Ouachita Par S/D La Rev bonds
158	05/03/2001	Payment of $98,804.00 from Paine Webber Account no. HM E0123 to purchase 100,000 units of West Ouachita Par S/D La Rev bonds
159	05/15/2001	Payment of $105,274.72 from Paine Webber Account no. HM E0123 to purchase 100,000 units of New Braunfels Texas Isd Unitd bonds
160	5/15/2001	Transfer of $200,000 by check number 177, payable to FYI Net, from Paine Webber Account no. HM E0123
161	6/4/2001	Transfer of $75,000 by electronic funds transfer from Paine Webber Account no. HM E0123 to Bank of America
163	6/6/2001	Transfer of $55,701.89 by automatic payment to Provident Bank from Paine Webber Account no. HM E0123
164	6/19/2001	Transfer of $50,000 by check number 179, payable

		to US Treasury, from Paine Webber Account no. HM E0123
165	9/18/2001	Transfer of $930,926.68, as part of a larger transfer of $3,405,739.03, from Paine Webber Account no. HM E0123 to First Union Account no. 8845-9357

In violation of Title 18, United States Code, Sections 1957, 2 and 3551 et seq.

Counts One Hundred Sixty-Six through One Hundred Seventy-One
(Money Laundering: REX SHELBY)

Counts One Hundred Sixty-Six through One Hundred Seventy-One of the Indictment charge as follows:

On or about the dates listed in the chart below, within the Southern District of Texas and elsewhere, the defendant

REX SHELBY

did knowingly engage and attempt to engage, and did aid, abet, counsel, command, induce, procure and cause others to engage and attempt to engage in the following monetary transactions by, through or to a financial institution, affecting interstate commerce, in criminally derived property of a value greater than $10,000, to wit, the following transfers of funds generated through wire fraud and fraud in the sale of securities, which funds were derived from a

specified unlawful activity, that is, wire fraud in violation of Title 18, United State Code, Section 1343, and fraud in the sale of securities in violation of Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5.

Count	Date	Transaction
166	2/16/2001	Transfer of $5,449,848.66, as part of a larger transfer of $5,454,737.19, from Paine Webber account no. HM E0299 to Paine Webber account no. HM E0109
167	4/2/2002	Transfer of $800,000 by check no.107 from Paine Webber account no. HM E0109 to Fidelity Cash Reserves account no. 2BX-812021
168	4/2/2002	Transfer of $400,000 by check no. 108 from Paine Webber account no. HM E0109 to Fidelity Municipal Money Market account no. 2BX-812021
169	4/6/2002	Transfer of $1,200,000 by check no. 109 from Paine Webber account no. HM E0109 to Vanguard Prime Money Market Fund account no. 9956144176 ($800,000)

		and to Vanguard Federal Money Market Fund account no. 9956144176 ($400,000)
170	4/6/2002	Transfer of $1,600,000 by check no. 110 from Paine Webber account no. HM E0109 to Dreyfus Money Market Reserves account no. 317-0001465913 ($800,000) and to Dreyfus Worldwide Dollar Money Market Fund account no. 762-0214600876 ($800,000)
171	4/7/2002	Transfer of $1,200,000 by check no. 111 from Paine Webber account no. HM E0109 to T. Rowe Price Summit Cash Reserves Fund account no. 522676398-0 ($800,000) an to T. Rowe Price Short Term Bond Fund account no. 522676402-8 ($400,000)

In violation of Title 18, United States Code, Sections 1957, 2 and 3551 et seq.

Counts One Hundred Seventy-Five through One Hundred Seventy-Six
(2001 Money Laundering: JOSEPH HIRKO)

Counts One Hundred Seventy-Five through One Hundred Seventy-Six of the Indictment charge as follows:

On or about the dates listed in the chart below, within the Southern District of Texas and elsewhere, the defendant

JOSEPH HIRKO

did knowingly engage and attempt to engage, and did aid, abet, counsel, command, induce, procure and cause others to engage and attempt to engage in the following monetary transactions by, through or to a financial institution, affecting interstate commerce, in criminally derived property of a value greater than $10,000, to wit, the following transfers of funds generated through wire fraud and fraud in the sale of securities, which funds were derived from a specified unlawful activity, that is, fraud in the sale of securities in violation of Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5.

Count	Date	Transaction
175	1/30/01	Transfer of $2,099,605.00 by wire from Paine Webber account no. HM E0292 to Bank of America account no. 28041-15627
176	2/01/01	Transfer of $8,243,362.00 by wire from Paine Webber account no. HM E0292 to

		Bank of America account no. 28041-15626

In violation of Title 18, United States Code, Sections 1957, 2 and 3551 et seq. .

Section 1957 of Title 18, United States Code, makes it a crime to knowingly engage or attempt to engage in a monetary transaction in criminally derived property of a value greater than $10,000. Specifically, section 1957 provides:

> Whoever . . knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity in the United States. . . . [commits a crime].

In order to sustain its burden of proof on the money laundering counts against defendant JOSEPH HIRKO in Counts 55-66 and Counts 175-176, SCOTT YEAGER in Counts 67-165, and REX SHELBY in Counts 166-171, the government must prove each of the following essential elements beyond a reasonable doubt:

First: That the defendant engaged or attempted to engage in a monetary transaction;

Second: That the monetary transaction involved criminally derived property of a value greater than $10,000;

Third: That the property was in fact derived from a specified unlawful activity, that is, wire fraud in violation of Title 18, United States Code, Section 1343, and fraud in the sale of securities in violation of Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5;

Fourth: That the defendant acted knowingly, that is, with knowledge that the transaction involved proceeds of a criminal offense; and

Fifth: That the transaction took place in the United States.

The term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate commerce, of funds or a monetary instrument by, through, or to a financial institution.

The term "financial institution" includes a commercial bank, investment bank, investment company, and a securities broker.

The term "interstate or foreign commerce" means commerce between any combination of states, territories or possessions of the United States, or between the United States and a foreign country.

It is not necessary for the government to show that the defendant actually intended or anticipated an effect on interstate commerce by his actions or that commerce was actually affected. All that is necessary is that the natural and probable

consequence of the acts the defendant took would be to affect interstate commerce. If you decide that there would be any effect at all on interstate commerce, then that is enough to satisfy this element. The effect can be minimal.

The term "criminally derived property" means any property constituting, or derived from, the proceeds of a criminal offense. The term "proceeds" includes any property, or any interest in property, that someone acquires or retains as a result of the commission of the underlying specified unlawful activity. Proceeds can be any kind of property, not just money.

The government must prove that the defendant knew that the property involved in the monetary transaction constituted, or was derived from, proceeds obtained by some criminal offense. The government does not have to prove that the defendant knew the precise nature of that criminal offense, or knew the property involved in the transaction represented the proceeds of wire fraud or fraud in the sale of securities.

Although the government must prove that, of the property at issue, more than $10,000 was criminally derived, the government does not have to prove that all of the property at issue was criminally derived.

Where a defendant is charged under section 1957 with making a monetary transaction from an account containing money that is derived from criminal activity (i.e., "tainted" money), and money that is not derived from criminal activity (i.e., "clean" money), the government must prove beyond a reasonable doubt that there was more than $10,000

of tainted money in the account, and that the defendant transferred from the account an amount of money that exceeds the amount of clean money in the account by more than $10,000. When the aggregate amount withdrawn from an account containing commingled funds exceeds the clean funds, individual withdrawals may be said to be of tainted money, even if a particular withdrawal was less than the amount of clean money in the account.

AIDING AND ABETTING

Each of Counts Two through One-Hundred Seventy-Six of the Indictment additionally charge the defendant or defendants named in the specific count you are considering with aiding and abetting the commission of the offense charged in that count.

The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by him through the direction of another person as his or her agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

If another person is acting under the direction of the defendant you are considering, or if the defendant you are considering joins another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct himself.

Before any defendant may be held criminally responsible for the acts of others, however, it is necessary that the defendant deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.

Of course, mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission with the intent to violate the law.

For you to find a defendant guilty of this crime, you must be convinced that the government has proved each of the following essential elements beyond a reasonable doubt:

First: That the offense was committed by some person;

Second: That the defendant associated with the criminal venture;

Third: That the defendant purposefully participated in the criminal venture; and

Fourth: That the defendant sought by action to make that venture successful.

"To associate with the criminal venture" means that the defendant shared the criminal intent of the principal. This element cannot be established if the defendant had no knowledge of the principal's criminal venture.

"To participate in the criminal venture" means that the defendant engaged in some affirmative conduct designed to aid the venture or assisted the principal of the crime.

THE VERDICT

To reach a verdict, all of you must agree. Your verdict must be unanimous. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty to consult with one another and to deliberate in an effort to reach agreement if you do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your mind if convinced that you were wrong. But do not give up your honest beliefs as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are the judges of the facts. Your sole interest is to seek the truth from the evidence in the case, to decide whether the government has proved the accused guilty beyond a reasonable doubt.

When you retire to the jury room you may take this charge with you as well as exhibits which the Court has admitted into evidence. You should first select one of your number to act as your Foreperson who will preside over your deliberations and will be your spokesperson here in court. A form of verdict has been prepared for your convenience.

The Foreperson will write the unanimous verdict answer of the jury in the space provided, either not guilty or guilty. At the conclusion of your deliberations, the Foreperson should date and sign the verdict.

You have been instructed that your verdict, whether it is not guilty or guilty, must be unanimous. The following instruction applies to the unanimity requirement as to the counts in the indictment that are described below.

The indictment charges a conspiracy to commit two separate crimes or offenses. First, the indictment charges the defendants with conspiracy to commit the offense of securities fraud. Second, the indictment charges the defendants with conspiracy to commit the offense of wire fraud.

It is not necessary for the government to prove a conspiracy to commit both offenses. It would be sufficient if the government proves beyond a reasonable doubt a conspiracy to commit one of those offenses; but, in that event, in order to return a verdict of guilty, you must unanimously agree upon which one of the two offenses was the subject of the conspiracy. If you cannot unanimously agree in that manner, you must find the defendant not guilty.

In addition, if you unanimously find that there was a conspiracy to commit one of the crimes

or offenses above, you must also unanimously agree that the defendant you are considering was a member of that conspiracy. That is, to find any particular defendant guilty of conspiracy, you must unanimously agree that the government proved beyond a reasonable doubt that there was a conspiracy to commit one of the crimes or offenses charged in the indictment and that the defendant you are considering was a member of that particular conspiracy. A conspiracy count, just like any other count, requires that you make the determination individually with respect to each defendant. A finding of not guilty or guilty as to one defendant on the charge of conspiracy should not influence your finding as to each other defendant.

Count Two of the Indictment accuses defendants JOSEPH HIRKO, SCOTT YEAGER, and REX SHELBY of committing Securities Fraud in three different ways in connection with purchases and sales of Enron stock and by the use of the instruments of communication in interstate commerce and the mails, namely: (i) by employing devices, schemes, and artifices to defraud; (ii) by making untrue statements of material facts and omitting to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (iii) engaging in acts, practices, and courses of conduct which operated as a fraud and deceit upon members of the investing public. As to these charges, again, the government does not have to prove all of the ways alleged for you to return a guilty verdict on these charges. Proof beyond a reasonable doubt on one is enough. But, in order to

return a guilty verdict, all twelve of you must agree that the same one has been proved.

Count Seven of the Indictment accuses defendants KEVIN HOWARD and MICHAEL KRAUTZ of committing Securities Fraud in three different ways in connection with purchases and sales of Enron stock and by the use of the instruments of communication in interstate commerce and the mails, namely: (i) by employing devices, schemes, and artifices to defraud; (ii) by making untrue statements of material facts and omitting to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (iii) engaging in acts, practices, and courses of conduct which operated as a fraud and deceit upon members of the investing public. As to these charges, again, the government does not have to prove all of the ways alleged for you to return a guilty verdict on these charges. Proof beyond a reasonable doubt on one is enough. But, in order to return a guilty verdict, all twelve of you must agree that the same one has been proved.

If, during your deliberations, you should want to communicate with me at any time, please give a written message or question to the Court Security Officer, who will bring it to me. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I will always first disclose to the attorneys your question and my response before I answer your question. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

Bear in mind that you are never to reveal to any person, not even to the Court, how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict.

SIGNED this 13th day of July, 2005.

/s/ Vanessa D. Gilmore

VANESSA D. GILMORE

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
v.	§	CRIMINAL ACTION NO. H-03-0093
	§	
SCOTT YEAGER	§	

VERDICT FORM

COUNT ONE - Conspiracy to Commit Wire and Securities Fraud

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

NOT GUILTY
"Not Guilty" or "Guilty"

COUNT TWO - Securities Fraud: January 2000 Analyst Conference

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

NOT GUILTY
"Not Guilty" or "Guilty"

COUNT THREE - Wire Fraud: April 1999 to July 2000

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

NOT GUILTY
"Not Guilty" or "Guilty"

COUNT FOUR - Wire Fraud: April 1999 to July 2000

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

NOT GUILTY
"Not Guilty" or "Guilty"

COUNT FIVE - Wire Fraud: April 1999 to July 2000

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

NOT GUILTY
"Not Guilty" or "Guilty"

COUNT SIX - Wire Fraud: April 1999 to July 2000

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

NOT GUILTY
"Not Guilty" or "Guilty"

COUNT TWENTY-SEVEN - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT TWENTY-EIGHT - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT TWENTY-NINE - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT THIRTY - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT THIRTY-ONE - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT THIRTY-TWO - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT THIRTY-THREE - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT THIRTY-FOUR - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT THIRTY-FIVE - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT THIRTY-SIX - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT THIRTY-SEVEN - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT THIRTY-EIGHT - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT THIRTY-NINE - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT FORTY - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT FORTY-ONE - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT FORTY-TWO - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT FORTY-THREE - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT FORTY-FOUR - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT FORTY-FIVE - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT FORTY-SIX - Insider Trading

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT SIXTY-SEVEN - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT SIXTY-EIGHT - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT SIXTY-NINE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT SEVENTY - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT SEVENTY-ONE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT SEVENTY-TWO - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT SEVENTY-THREE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT EIGHTY - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT EIGHTY-ONE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT EIGHTY-TWO - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT EIGHTY-THREE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT EIGHTY-FOUR - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT EIGHTY-FIVE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT EIGHTY-SIX - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT EIGHTY-SEVEN - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT EIGHTY-EIGHT - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT EIGHTY-NINE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT NINETY - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT NINETY-ONE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT NINETY-TWO - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT NINETY-THREE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT NINETY-FOUR - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT NINETY-FIVE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT NINETY-SIX - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT NINETY-SEVEN - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT NINETY-EIGHT - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT NINETY-NINE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED ONE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED TWO - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED THREE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FOUR - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FIVE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED SIX - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED SEVEN - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED EIGHT - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED NINE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED TEN - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED ELEVEN - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED TWELVE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED THIRTEEN - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FOURTEEN - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FIFTEEN - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED SIXTEEN - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED SEVENTEEN - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED EIGHTEEN - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED NINETEEN - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED TWENTY - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED TWENTY-ONE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED TWENTY-TWO - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED TWENTY-THREE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED TWENTY-FOUR - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED TWENTY-FIVE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED TWENTY-SIX - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED TWENTY-SEVEN - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED TWENTY-EIGHT - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED TWENTY-NINE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED THIRTY - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED THIRTY-ONE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED THIRTY-TWO - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED THIRTY-THREE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED THIRTY-FOUR - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED THIRTY-FIVE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED THIRTY-SIX - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED THIRTY-SEVEN - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED THIRTY-EIGHT - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED THIRTY-NINE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FORTY - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FORTY-TWO - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FORTY-FOUR - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FORTY-FIVE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FORTY-SEVEN - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FORTY-EIGHT - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FORTY-NINE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FIFTY - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FIFTY-ONE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FIFTY-TWO - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FIFTY-THREE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FIFTY-FOUR - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FIFTY-FIVE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FIFTY-SIX - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FIFTY-SEVEN - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FIFTY-EIGHT - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED FIFTY-NINE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED SIXTY - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED SIXTY-ONE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED SIXTY-THREE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED SIXTY-FOUR - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

COUNT ONE HUNDRED SIXTY-FIVE - Money Laundering

We, the jury, unanimously find the Defendant, SCOTT YEAGER,

"Not Guilty" or "Guilty"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	Cr. No. H-03-93-08
v.	§	Violations: 15 U.S.C. §§ 78j(b) and 78ff; 17 C.F.R. § 240.10b-5 (Securities Fraud); 18 U.S.C. § 1957 (Money Laundering); and 982 (Asset Forfeiture);
SCOTT YEAGER	§	

EIGHTH SUPERSEDING INDICTMENT

The Grand Jury charges:

Introduction

1. At all times relevant to this Eighth Superseding Indictment, Enron Corp. ("Enron") was a publicly traded Oregon corporation with its headquarters in Houston, Texas. Among other businesses, Enron was engaged in the purchase and sale of natural gas, construction and ownership of pipelines and power facilities, provision of telecommunication services, and trading in contracts to buy and sell various commodities. Before it filed for bankruptcy on December 2, 2001, Enron was the seventh largest corporation in the United States.

2. Enron was a publicly traded company whose shares were listed on the New York Stock Exchange. As a public company, Enron was required to comply with regulations of the United States Securities and Exchange Commission ("SEC").

Those regulations are intended to protect members of the investing public by, among other things, ensuring honest markets and promoting investor confidence. Investors have a legitimate expectation that the prices of actively traded securities reflect publicly available information about the companies that issue those securities.

3. The defendant SCOTT YEAGER is a resident of Sugarland, Texas. YEAGER became Senior Vice President of Strategic Development at EBS on approximately October 1, 1998. His employment at EBS was terminated on approximately August 1, 2001. In the year 2000, YEAGER received total compensation in excess of $30,600,000, including an annual bonus of $275,000.

Background

4. Prior to 1997, Enron was not involved in the telecommunications business. On July 1, 1997, Enron acquired a public utility, Portland General Corporation, based in Portland, Oregon. As part of that acquisition, Enron acquired Portland General's telecommunications division, FirstPoint Communications, Inc. ("FirstPoint"). In 1998, Enron changed the name of FirstPoint to Enron Communications, Inc. ("ECI") and expanded the business. In approximately January 2000, ECI was renamed Enron Broadband Services (ECI and EBS will collectively be referred to herein as "EBS"). At all times relevant to this Eighth Superseding Indictment, EBS was a wholly owned subsidiary of Enron engaged in the telecommunications business.

5. In late 1998, defendant SCOTT YEAGER proposed that Enron build an advanced,

software-driven, "intelligent" telecommunications network. YEAGER'S proposal was backed by, among others, Joseph Hirko, then CEO of Enron Communications, Inc. To implement this plan, Enron acquired Modulus, a small software company run by, among others, Rex Shelby. As a result of the Modulus acquisition, Shelby became Senior Vice President of Engineering Operations at EBS and was tasked with turning Modulus' messaging software, called InterAgent, into complex "intelligent" network control software capable of running a nationwide telecommunications network with advanced features.

6. In April 1999, EBS announced that the Enron Intelligent Network was lit and operational and ready to deliver two applications. This announcement was followed by numerous public statements by the company in press releases and presentations to analysts describing that EBS possessed a network with a unique network control software layer. EBS claimed that its network control software allowed Enron to route data efficiently and reliably and provide a number of advanced features and services to customers.

7. In summer 1999, Enron announced that EBS would become a "core" Enron business and a major part of Enron's overall business strategy. In early November 1999, Enron senior management decided to make EBS the centerpiece of Enron's annual presentation to equity analysts, scheduled for January 20, 2000.

Enron's Insider Trading Policy

8. As a publicly traded company, Enron adopted an insider trading policy that prohibited any employee while in possession of material nonpublic information relating to Enron or to an Enron subsidiary, from buying or selling securities of Enron Corporation, or engaging in any action to take advantage of that information.

9. Enron's insider trading policy defined material information as any information that a reasonable investor would consider important in a decision to buy, hold, or sell stock and any information which could reasonably be expected to affect the price of the stock.

10. Enron's insider trading policy was contained in and provided to employees in the corporation's Code of Ethics.

The Defendant's Acquisition of Inside Information

11. At various times during 1999, and early 2000, numerous EBS executives and employees informed YEAGER, and others that, among other things, EBS had not developed network control software, EBS' network was controlled manually and that product and software development efforts were stalled and in disarray. YEAGER, in turn, communicated these concerns to his superiors.

12. From approximately October 1999, through December 1999, YEAGER received reports, emails and documents, from executives at EBS that EBS' network did not have network control software, was not secure and that its product and software development efforts were plagued by organizational

dysfunction and technical shortcomings. YEAGER and others were further informed that only a limited version of one product was released and another previously announced product would generate no revenue in 1999, and little revenue in 2000.

13. Defendant YEAGER was informed through emails, presentations and reports that among other things, the "I" in EBS' touted Enron Intelligent Network (EIN) was not developed. YEAGER, in turn, described EBS' "intelligent" software to EBS employees at an internal meeting in early January 2000 as being "in the first grade."

14. On January 20, 2000, EBS was the major focus of Enron's annual equity analyst conference held in Houston, Texas. The EBS presentation, which defendant YEAGER attended, featured numerous statements about EBS's technical capabilities including that EBS had *already* established the superior broadband delivery network and that EBS had a network control software layer that was its core differentiator.

15. As YEAGER knew from the communications described above, as well as from other information that he received, EBS' network was controlled manually and not by a network control software layer. Further he was aware that EBS did not possess most of the advanced capabilities claimed during the January 20, 2000 presentation.

16. On January 20, 2000, the day of the presentation, the share price of Enron stock increased from approximately $54 to $67. The following day, the stock rose above $72.

17. Following the Analyst Conference, and throughout spring 2000, YEAGER continued to receive information that EBS's product development efforts were ineffective, and that EBS was at the very early stages of developing network control software. This information was not provided to the investing public.

18. On February 2-3, 2000, and again on March 1-3, 2000, YEAGER attended offsite meetings for senior EBS executives in Arizona at which the status of EBS' commercial and technical progress was discussed. YEAGER and others were informed at these meetings that, among other things, EBS's network was not yet fully operational, network control software was not controlling its network and previously announced products were still struggling to take shape.

19. Throughout March and April of 2000, YEAGER continued to receive information as Senior Vice President of Strategic Development about the status of EBS' product and software development efforts as well as business performance. This information included, among other things, that EBS was just beginning its efforts to develop its network control software, renamed the Broadband Operating System.

The Defendant's Insider Trading

20. Defendant YEAGER received shares and options relating to Enron stock as part of his compensation. At a time when he was in possession of material nonpublic information, including that EBS lacked its touted technological and commercial capabilities, he sold large quantities of Enron stock

generating significant profits. Specifically, between January 21, 2000, and May 11, 2000, YEAGER sold $11,342,103 in Enron stock.

21. On January 21, 2000, the day after the Analyst Conference, YEAGER sold $7,206,890 in Enron stock.

22. On March 22, 2000, YEAGER sold $1,875,000 in Enron stock.

23. On April 12, 2000, YEAGER sold $737,563 in Enron stock.

24. On May 10, 2000, and May 11, 2000, YEAGER sold $750,000.00 and $772,650 in Enron stock respectively.

25. At the time of the sales described in paragraphs 20 through 24, YEAGER was in possession of material nonpublic information including, but not limited to, the information described in the preceding paragraphs.

COUNTS ONE THROUGH FIVE
(Securities Fraud: Insider Trading)

26. The allegations in paragraphs 1 through 24 are realleged as if fully set forth here.

27. On or about the dates set forth below, within the Southern District of Texas and elsewhere, the defendant SCOTT YEAGER knowingly and willfully used and employed manipulative and deceptive devices and contrivances, by use of means and instrumentalities of interstate commerce, in violation of Rule 10b-5 of the Rules and Regulations of the United States Securities and Exchange Commission (Title 17, Code of Federal Regulations,

Section 240.10b-5), in that he engaged in acts, practices, and courses of business which would operate as a fraud and deceit upon members of the investing public in connection with the purchase or sale of securities, in violation of Title 15, United States Code, Section 78j(b) and 78ff. Specifically, while in possession of material non-public information regarding the technological capabilities, value, revenue and business performance of Enron Communications, Inc. and Enron Broadband Services, YEAGER sold shares of Enron stock as follows, generating total proceeds of $11,342,103:

Count	Date	Shares	Sale Price	Gross Proceeds
1	1/21/00	100,000	$72.0689	$7,206,890.00
2	3/22/00	25,000	$75.00	$1,875,000.00
3	4/12/00	10,000	$73.7563	$737,563.00
4	5/10/00	10,000	$ 75.00	$750,000.00
5	5/11/00	10,000	$77.2650	$772,650.00

(Title 17, Code of Federal Regulations, Section 240.10b-5; Title 15, United States Code, Sections 78j(b) and 78ff; Title 18, United States Code, Sections 2 and 3551 et seq.)

COUNTS SIX THROUGH THIRTEEN
(Money Laundering)

28. The allegations in paragraphs 1 through 27 are realleged as if fully set forth here.

29. On or about the dates listed in the chart below, within the Southern District of Texas and elsewhere, the defendant SCOTT YEAGER did knowingly engage and attempt to engage, and did aid, abet, counsel, command, induce, procure and cause others to engage and attempt to engage in the following monetary transactions by, through or to a financial institution, affecting interstate commerce, in criminally derived property of a value greater than $10,000, to wit, the following transfers of funds generated through fraud in the sale of securities, specifically, insider trading, which funds were derived from a specified unlawful activity, that is, fraud in the sale of securities in violation of Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5.

Count	Date	Transaction
6	2/7/2000	Transfer of $250,000 by federal funds wire from Paine Webber Account no. HS E2608 to Salomon Smith Barney Account no. 414-4317510106
7	3/15/2000	Transfer of $1,000,000, by federal funds wire, from Paine Webber Account no. HS E2608 to EOL Partnership
8	4/5/2000	Transfer of $100,000 by federal funds wire from Paine Webber Account no. HS E2608 to BancFirst - Insured Escrow Service

9	4/10/2000	Transfer of $400,000 by federal funds wire from Paine Webber Account no. HS E2608 to Merrill Lynch account no. 230-63517
10	6/14/2000	Payment of $250,000.00 from Paine Webber Account no. HS E2608 to purchase 10 shares of Dreyfus Muni Income Inc.
11	6/14/2000	Payment of $750,000.00 from Paine Webber Account no. HS E2608 to purchase 30 shares of Muniyield Fund Inc.
12	6/16/2000	Transfer of $425,000 by federal funds wire from Paine Webber Account no. HS E2608 to Merrill Lynch Account no. 230-63517
13	8/23/2000	Payment of $621,500.25 in proceeds as a portion of $2,000,000 paid from Paine Webber Account no. HS E2608 to purchase 621,500.25 units of Manulife North American out of a total of 2,000,000 units purchased

(Title 18, United States Code, Sections 1957, 2 and 3551 et seq.)

FORFEITURE ALLEGATIONS

30. Upon conviction of one or more of the money laundering offenses alleged in this Eighth Superseding Indictment, the defendant shall forfeit to the United States pursuant to 18 U.S.C. § 982(a)(1) the following property:

a. all right, title, and interest in any and all property involved in each offense in violation of 18 U.S.C. § 1957 for which the defendant is convicted, and all property traceable to such property, including the following: (1) all money or other property that was the subject of each transaction, transportation, transmission, or transfer in violation of Section 1957; (2) all commissions, fees and other property constituting proceeds obtained as a result of those violations; and (3) all property used in any manner or part to commit or to facilitate the commission of those violations.

b. A sum of money equal to the total amount of money involved in each offense, for which the defendant is convicted.

31. Pursuant to 21 U.S.C. § 853(p), as incorporated by Title 18, United States Code, Section 982(b), each defendant shall forfeit substitute property, up to the value of the amount described in paragraph 30, if, by any act or omission of said defendant,

a. cannot be located upon the exercise of due diligence;

b. has been transferred, sold to or deposited with a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty.

All in accordance with 18 U.S.C. § 982(a)(1), and Rule 32.2(a), Federal Rules of Criminal Procedure.

(Title 18, United States Code, Section 982)

Dated: Houston, Texas

November 9, 2005

A TRUE BILL

FOREPERSON

PAUL PELLETIER
Acting U. S. Attorney

SEAN BERKOWITZ
Director, ENRON TASK FORCE

By: /s/ Lisa O. Monaco
BENTON J. CAMPBELL
LISA O. MONACO
Assistant United
States Attorneys
ENRON TASK FORCE

PATRICK MURPHY
Trial Attorney,
Department of Justice

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
JAN 12 2009
OFFICE OF THE CLERK

No. 08-67

In the
Supreme Court of the United States

F. SCOTT YEAGER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether, when a jury acquits a defendant on multiple counts but fails to reach a verdict on other counts that share a common element, and, after a complete review of the record, the court of appeals determines that the only rational basis for the acquittals is that an essential element of the hung counts was determined in the defendant's favor, collateral estoppel bars a retrial on the hung counts.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were Joseph Hirko, Rex Shelby, Petitioner F. Scott Yeager, and Respondent the United States of America.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Petition Appendix ("Pet. App.") 1a-28a) is reported at 521 F.3d 367. The opinion of the United States District Court for the Southern District of Texas (Pet. App. 29a-66a) is reported at 446 F. Supp. 2d 719.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2008. A petition for rehearing en banc was denied on April 14, 2008. Pet. App. 68a-70a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment, set out in the appendix to the petition (Pet. App. 71a), provides in pertinent part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

This case arises out of the reprosecution of Petitioner F. Scott Yeager on multiple counts of insider trading and money laundering following a lengthy jury trial at which he was acquitted of closely related charges of conspiracy, securities fraud and wire fraud. The jury that acquitted Yeager deadlocked on the insider trading and money laundering counts. Yeager moved to bar his retrial on the hung counts, arguing that the jury, by acquitting him, resolved in his favor an issue of ultimate fact common to the acquitted and hung counts.

Yeager argued that his retrial was barred by this Court's holding in *Ashe v. Swenson*, 397 U.S. 436 (1970), that the Double Jeopardy Clause embodies principles of collateral estoppel. After a thorough *de novo* review of the record, the court of appeals concluded that the only rational interpretation of the jury's acquittals was that Yeager did not possess insider information, a critical element of the hung insider trading counts. Pet. App. 21a. Nonetheless, solely because of the presence of the hung counts, the court of appeals refused to apply collateral estoppel. Pet. App. 22a. According to that court, the jury's failure to reach a verdict on the hung counts was inconsistent with its acquittals on counts sharing an essential element with them. In its view, the jury would have acquitted on the hung counts if it had determined that Yeager did not possess insider information. This presumed inconsistency "precluded" Yeager from establishing that the jury necessarily decided a common factual element in his favor. Pet. App. 27a.

Yeager now faces trial on an Eighth Superseding

Indictment charging five counts of insider trading and eight counts of money laundering that he already faced at his first trial. A retrial will allow the government to avoid the jury's rejection of its theory of prosecution and sidestep the evidentiary weaknesses in its case exposed during the first trial, in the hope that a different jury will reach factual determinations contrary to those made by the first jury. Yeager seeks to bar the government from retrying the fact of his possession of insider information, which is an essential element of the currently pending charges.

The Fifth Superseding Indictment.

1. As Vice President for Strategic Development at Enron Broadband Services ("EBS"), Yeager helped develop its telecommunications network and a series of products designed to promote its use. Yeager, along with four other EBS executives, was charged with conspiracy to engage in securities fraud and wire fraud (18 U.S.C. § 371); wire fraud (18 U.S.C. § 1343); securities fraud (17 C.F.R. § 240.10b-5, 15 U.S.C. §§ 78j(b) and 78ff); insider trading (17 C.F.R. § 240.10b-5, 15 U.S.C. §§ 78j(b) and 78ff); and money laundering (18 U.S.C. § 1957).

The Fifth Superseding Indictment named Yeager as a defendant in 127 of its 176 counts, charging that he and others engaged in a scheme to make false and misleading statements and material omissions designed to deceive investors about the technological capabilities, value, revenue, and business performance of EBS. Joint Appendix ("J.A.") 9.

Each of the counts on which Yeager was tried relied on the same basic factual allegations, because they incorporated Paragraphs 1 to 33 of the Fifth

Superseding Indictment, which described the defendants' participation in a scheme to profit from the sale of inflated Enron stock by misrepresenting EBS's capabilities and concealing its shortcomings from the public. *See* J.A. 20 (incorporating ¶¶ 1-33 into Count One); J.A. 25 (Count Two); J.A. 26 (Counts Three through Six); J.A. 29 (Counts Twenty-seven through Forty-six); J.A. 37 (Counts Sixty-seven through One Hundred Sixty-Five). Yeager's insider trading was described in the incorporated Paragraphs 11 and 33. Paragraph 33 alleged that "[a]t a time when they and others at Enron were making materially false and misleading public statements about EBS, the defendants sold large quantities of Enron stock, generating huge profits." J.A. 20. Paragraph 11 described the overall scheme. J.A. 9.

The misrepresentations and omissions allegedly began around April 1999, with EBS's release of several materially false and misleading press releases about its development of an advanced, intelligent telecommunications network. J.A. 10-11. These releases continued throughout the remainder of 1999. J.A. 10-11. In November 1999, Enron fully committed to Yeager's strategic plan to develop a telecommunications network and elevated EBS from a third-level subsidiary to a business division of Enron, with the announcement to come at a January 2000 Enron conference for securities analysts (the "2000 Analysts Conference"). J.A. 11.

Yeager attended the 2000 Analysts Conference, and while he "barely said a word," he is alleged to have been part of the effort to systematically misrepresent and fail to disclose truthful information about EBS and its network. Record on Appeal ("R-") 5716. The next day, the price of Enron

stock rose significantly, allegedly as the result of the presentation at the conference. J.A. 12-13. The indictment went on to allege that, following the conference, Yeager continued to cause "the issuance of materially false and misleading press releases" about EBS. J.A. 13. At the same time, according to the indictment, Yeager traded in Enron stock while in possession of insider information about problems at EBS that he failed to disclose. This was the same information he was also charged with failing to disclose in the conspiracy, securities fraud, and wire fraud counts. J.A. 20. The indictment also charged that Yeager engaged in a series of monetary transactions with the proceeds of the wire fraud and securities fraud, in violation of the money laundering statute.

2. Yeager moved to dismiss the insider trading charges for failure to specify the insider information that he allegedly possessed. *See* R-3488. The government responded that the incorporation of Paragraphs 1 to 33—especially Paragraph 17, which described the 2000 Analysts Conference—provided an adequate description of the insider information. R-4165.

The district court denied Yeager's motion. It concluded that Paragraph 17 identified Yeager's knowledge of false statements and omissions made at the 2000 Analysts Conference as the insider information that Yeager allegedly failed to disclose at the times he traded Enron stock. R-5052.

Over Yeager's objections, the indictment was neither read to the jury nor provided to it during its deliberations. R-20409, 20412-15, 20423-24, 20430-35. Instead, the jury was read only parts of the indictment, including the charging language, portions of several counts, the conspiracy's overt

acts, and Paragraph 11, which set out a single factual basis for the conspiracy, securities fraud, wire fraud, and insider trading charges:

> [The defendants] made false and misleading statements and omitted material information from statements made, all of which were designed to and did deceive the investing public and others about the technological capabilities, value, revenue and business performance of EBS. The defendants executed this scheme by, among other means: (i) causing Enron to issue materially false and misleading press releases; (ii) making and causing others to make materially false and misleading statements to equity analysts and others; (iii) using fraudulent means to generate revenue so that EBS and Enron could appear to reach publicly declared financial targets; and (iv) failing to disclose material adverse information about EBS's poor business performance. During this same time period, defendants [including Yeager] sold large quantities of Enron stock, generating millions of dollars for themselves.

J.A. 9. The government's bill of particulars response clarified that the information that Yeager allegedly failed to disclose in the securities fraud, wire fraud, and conspiracy counts was the same information he allegedly failed to disclose when he sold Enron stock. R-21724-25. Accordingly, each of the counts against Yeager asked the jury to determine whether he possessed and failed to disclose the same insider information.

Trial Evidence, Argument And Pleadings.

1. At trial, the government portrayed EBS's effort to develop its network as a failure plagued by technical shortcomings, incomplete network software, and a host of administrative and personnel problems. Throughout its presentation of evidence, and in argument to the jury during the thirteen-week jury trial, the government insisted that Yeager and others misrepresented and failed to disclose the "truth" about EBS's dysfunction to the investing public in order to drive up the price of Enron stock and then sell their stock at inflated prices. These stock sales were characterized as insider trading.

The first words in the prosecutor's opening statement were: "This case is about lying, lying for profit. The evidence will show that these five men seated over here lied to the public in order to make millions of dollars in profit. Not just for their company, but for themselves." R-5701. The prosecutor squarely linked the charged insider trading with the failures to disclose charged in the securities and wire fraud counts, arguing "[t]he evidence will show that they made this money from their [sale] of stock while they knew the real story and while they hid it from the public." R-5718. Later in her opening statement, the prosecutor left no doubt that the insider trading charges were based on the identical failures to disclose: "The public didn't get the benefit of what they knew. These men got that benefit and millions more. You will learn that's called insider trading, and it's a crime." R-5725.

In presenting the testimony of former codefendant Kenneth Rice, the government continued this theme, eliciting his statement that

the purpose of lies at the 2000 Analysts Conference was to "[g]et the stock price up." R-6718. The government tied this inflation of the stock price to Rice's admitted insider trading and asked what insider information he personally traded on. Rice answered, "[t]he information I had was the fact that the market believed our network was capable of doing more than it really was, and I helped lead them to believe that, and that was information that I had that the market did not have." R-6719-20.

The government focused at trial on proving that Yeager's failure to disclose information was as culpable as an affirmative misrepresentation about EBS. During Yeager's cross examination, the government challenged him for not speaking out at the 2000 Analysts Conference, R-16892-96, and, claiming that he had a duty to disclose, repeatedly asked why he failed to correct misstatements and omissions and to tell the "entire story about EBS." R-16986-88, 17040.

2. At the close of the government's case, Yeager moved for a judgment of acquittal. In response, the government argued that it had proven the insider trading case because:

> Each of the defendants possessed and used material, non-public information to profit from their criminal plan. Each of the defendants[] knew that the true state of the business did not reflect what had been told to the investing public when they [sold stock]. By selling their stock [they] completed their crime that began with the conspiracy in April 1999.

R-12809. The government thus admitted that the misrepresentations and omissions about EBS were essential to the insider trading charges and argued that the insider information on which Yeager traded was his knowledge that public statements about EBS were false.

In rebuttal closing argument, the government concluded by linking Yeager's stock sales with the fraud counts, saying that the investing public "didn't have the advantage of the inside story . . . because each of these men played their role and chose to lie and put on a charade." R-21324-25.

This left no doubt in the jury's mind that the government's claim was that the insider information that Yeager allegedly traded on was his knowledge that the statements made at the 2000 Analysts Conference and in press releases about EBS were false and that the same undisclosed "truth" about EBS was the basis for the conspiracy, wire fraud, and securities fraud charges.

Jury Instructions.

In its instructions on the elements of insider trading, the district court directed the jury to the description of the scheme, misstatements, and omissions "as detailed in the indictment." J.A. 124-25. The jury, unable to review the indictment in its entirety, would naturally have looked to Paragraph 11, the only factual description of the scheme made available to it.

The district court instructed that insider trading occurs when a person who comes into possession of material, nonpublic information uses that information to buy or sell stock, without disclosing that information to the public. J.A. 125. The

instructions on the insider trading charges included a single-sentence description of Yeager's possession of insider information: "Specifically, while in possession of material, nonpublic information regarding the technological capabilities, value, revenue, and business performance of . . . Enron Broadband Services, Yeager sold shares of Enron stock. . . ." J.A. 119. Accordingly, the insider trading charges were submitted to the jury on the government's theory that they, like the conspiracy, securities fraud, and wire fraud charges, were based on the same nondisclosures of information at the 2000 Analysts Conference and in the press releases.

The Jury's Deliberations And Verdict.

After four days of deliberation, the jury announced that it had reached agreement on some counts and was deadlocked on others. R-21523. The district court then gave an *Allen* charge to the jury and ordered it to continue its deliberations "until the end of the day," which was approximately an hour away. R-21536. When 70 minutes later the jury indicated that it had not made additional progress, the district court decided to "take their verdict" rather than allow a fifth day of deliberations. R-21537-40.

The jury acquitted Yeager on all of the conspiracy, securities fraud, and wire fraud counts. J.A. 161-62. The jury deadlocked on charges that Yeager, as the culmination of the scheme, engaged in insider trading and money laundering. J.A. 162-66. The jury also entered several other acquittals on counts against Yeager's codefendants, entered no convictions, and failed to reach a verdict on a total of 140 counts.

Yeager's Collateral Estoppel Challenge.

1. Yeager moved to dismiss the insider trading and money laundering counts of the Fifth Superseding Indictment as barred by collateral estoppel. *See* R-21586. In response to Yeager's motion, the government obtained an Eighth Superseding Indictment, separating Yeager from his codefendants and charging him with some of the same insider trading and money laundering offenses he had already faced at trial. But the government did not simply delete the acquitted counts of the Fifth Superseding Indictment and rely on the hung counts. It instead reworked and refined its theory of the case against Yeager.

The new indictment realleged five of the insider trading charges contained in the Fifth Superseding Indictment, which had charged that Yeager participated in a scheme to pump up the price of Enron stock and then sell his shares. The insider trading charges that remained in the Eighth Superseding Indictment, however, did not include the allegations that Yeager participated in the scheme, but rather alleged that he came into possession of adverse information about EBS and failed to disclose it when he sold his stock.

This was an obvious response to the acquittals of Yeager on the fraud counts, as is clear from the government's decision to leave the fraud allegations in the Seventh Superseding Indictment, which it brought against Yeager's codefendants, who were not acquitted of all the fraud counts. Yeager moved to dismiss the charges in the Eighth Superseding Indictment, arguing that they were also barred by collateral estoppel because, like the charges in the

Fifth Superseding Indictment, they relied on proof that Yeager possessed insider information when he traded in Enron stock.[1]

2. Yeager argued that the jury's acquittals necessarily determined an essential element of the insider trading charges, and that those charges were therefore barred by collateral estoppel. The district court refused to apply collateral estoppel because the jury had failed to acquit Yeager on the insider trading counts. Because it deadlocked on those charges, the court concluded, the jury did not accept Yeager's defense that he possessed a good-faith belief in the business prospects of EBS. Pet. App. 59a.

Proceedings In The Court Of Appeals.

1. Yeager appealed, and on March 17, 2008 a panel of the Fifth Circuit affirmed. The court of appeals first determined that it need not look further than Yeager's acquittal of securities fraud to conclude that, were it not for the hung counts, his reprosecution for insider trading was barred by collateral estoppel. It reasoned that the jury must have acquitted Yeager of securities fraud either (1) because there were no material misrepresentations or omissions made at the 2000 Analysts Conference or (2) because "Yeager did not knowingly make

[1] The government initially reserved its right to try Yeager on either one of the pending indictments. R-21902. Later, the government represented that it only sought to retry Yeager on the counts in the Eighth Superseding Indictment and claimed that those counts charged the "same offenses as the Fifth Superseding Indictment" on which Yeager was tried. Appellee's Br. (5th Cir. filed Dec. 22, 2006) ("Appellee's Br.") at 24, n.6.

misrepresentations and omissions because he believed the presentations were truthful." Pet. App. 20a. In either case, "the jury must have found when it acquitted Yeager that Yeager himself did not have any insider information that contradicted what was presented to the public." Pet. App. 21a.

The court specifically acknowledged that "when we consider the acquittals by themselves, it appears that Yeager is correct that collateral estoppel bars a retrial." Pet. App. 21a-22a. It therefore concluded that "[w]hether we can weigh hung counts in applying collateral estoppel then is critical to our analysis." Pet. App. 22a.

2. Deciding that it must weigh the hung counts under Fifth Circuit precedent, the court speculated that if the jury had acted "rationally [it] would also have acquitted Yeager of the insider trading counts." Pet. App. 22a. Based on this hypothesis regarding the sole way that a "rational" jury would have reached a verdict, the court held that, when the hung counts were considered, it was "faced with a potential inconsistency, making it impossible for us to decide with any certainty what the jury necessarily determined." Pet. App. 22a.

The court of appeals attempted to explain the "discrepancy" between the acquitted and hung counts and offered several guesses why the jury deadlocked, including that "the jury was irrational." Pet. App. 24a. It then concluded that, because Yeager was unable to demonstrate which of its posited explanations was correct, he "failed to carry his burden and establish what the jury necessarily decided." Pet. App. 25a. Thus, despite finding that the rest of the trial record compelled the conclusion that the jury decided Yeager did not possess undisclosed insider information, the court held that

the mere presence of the hung counts meant that "we cannot apply collateral estoppel in this case." Pet. App. 22a. By introducing the possibility that the jury acted irrationally, the court placed an impossible burden on Yeager to explain why the jury hung.

3. On April 14, 2008, Yeager's request for rehearing en banc was denied. Pet. App. 69a. Yeager filed a timely petition for a writ of certiorari on July 14, 2008, and his petition was granted on November 14, 2008.

SUMMARY OF THE ARGUMENT

As the court of appeals expressly acknowledged, the jury, by its acquittals, necessarily determined that Yeager was not in possession of insider information about EBS when he traded in Enron stock. The jury thus rejected an essential element necessary to convict Yeager on each of the pending insider trading counts. Yeager's retrial on these counts is therefore barred by criminal collateral estoppel, and the charges should be dismissed under *Ashe*, 397 U.S. 436. The jury's failure to reach a verdict on these counts does not change the *Ashe* analysis.

The fundamental protections of the Double Jeopardy Clause prevent the government from forcing a defendant to face ultimate facts already decided in his favor. The government cannot subject a defendant to repeated trials, as it refines its case in successive attempts to convict. Yeager should not be forced to defend himself in a second trial against the allegation, already rejected by the jury in his first trial, that he possessed the very same insider information.

Moreover, reversal of the decision below is necessary to vindicate this Court's insistence on the importance of giving proper deference to jury acquittals. Over the last century which has seen a dramatic proliferation of overlapping criminal offenses—the Court has applied the doctrine of criminal collateral estoppel to ensure that whenever a jury determines an essential factual issue in the defendant's favor, the government may not attempt to relitigate that issue in successive trials.

In contrast to verdicts of acquittal, courts have always viewed hung counts with disfavor. A hung count has never been recognized as a decision by the jury entitled to deference, and the Court should not adopt a rule that would allow a hung count to nullify an acquittal in a collateral estoppel analysis. While a court can find meaning in a jury's *acquittals* based upon a careful examination of the record, a hung count does not permit a similar analysis. To determine why a jury hung would require either an inquiry into the jury's deliberative process or speculation about why it failed to reach a verdict. Under *Ashe* and *United States v. Powell*, 469 U.S. 57 (1984), both are prohibited.

The entire case against Yeager was based on misrepresentations about problems at EBS, and the district court instructed the jury that a failure to disclose the true state of EBS was grounds for conviction on the conspiracy, securities fraud, and wire fraud counts. If the jury had found that Yeager knew that the statements at the 2000 Analysts Conference and in the press releases were false, and that he said nothing to correct them, it would have convicted him of securities fraud and wire fraud. Since it acquitted him on those counts, the jury necessarily determined that Yeager did not possess

and fail to disclose information about EBS. Now Yeager faces trial for illegally trading stock during the same time period while failing to disclose the very same information.

ARGUMENT

I. Yeager's Reprosecution On The Hung Counts Is Barred By Collateral Estoppel.

A. Applying Collateral Estoppel Here Would Further Important Double Jeopardy Protections.

1. Both history and the Double Jeopardy Clause decisions of this Court demonstrate that the protections of collateral estoppel are far too important to be limited as the court of appeals did here. First, the application of collateral estoppel to bar hung counts would ensure the fundamental protections of the Double Jeopardy Clause by precluding the government from forcing Yeager to answer factual allegations that have already been determined in his favor; such relitigation would unfairly allow the government to hone its case after an adverse verdict. Second, it would further the traditional deference accorded to jury acquittals. Third, it would protect against prosecutorial abuses that can arise from the overlapping nature of complex modern criminal statutes.

Ashe found that collateral estoppel "is embodied in the Fifth Amendment guarantee against double jeopardy" because "whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." 397 U.S. at 445-46.

Collateral estoppel "stands for an extremely important principle in our adversary system of justice." *Id.* at 443. The doctrine ensures that "when an issue of ultimate fact has once been determined by a valid and final judgment, the issue cannot again be litigated between the same parties in any future lawsuit." *Id.* First developed in civil litigation, collateral estoppel was a fixed principle of federal criminal law for many years before *Ashe*. *See, e.g., United States v. Oppenheimer*, 242 U.S. 85, 88 (1916).

The test established in *Ashe* requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." 397 U.S. at 444. This review should be conducted with "realism and rationality" rather than hypertechnical formalism, *id.*, and "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Id.* (quoting *Sealfon v. United States*, 332 U.S. 575, 579 (1948)) (internal citation omitted).

Although this inquiry may be time-consuming, it provides the best practicable method for determining what the jury decided by its acquittals. As this Court has recognized, any more technically restrictive test would mean that collateral estoppel never applied in criminal proceedings. *Ashe*, 397 U.S. at 444.

Applying collateral estoppel to mixed verdicts of acquittals and hung counts by the same jury is no more demanding of the reviewing court. Implicit in the decision below is the conclusion that, had the remaining insider trading counts been brought for the first time in a subsequent indictment, they would be barred by collateral estoppel. There is nothing about their inclusion in the same indictment as the acquitted counts that should change the *Ashe* analysis. A court's duty to preserve double jeopardy rights is equally important in all cases where a jury speaks its will through acquittals and the government seeks to force the defendant to defend twice against the same facts that the jury has already decided in his favor.

2. "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957). This concept has "ancient roots" in the "common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon, and found expression in the legal tradition of colonial America." *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980) (citing William Blackstone, 4 Commentaries 329-30 (1st ed. 1769); *Green*, 355 U.S. at 187; *id.* at 200 (dissenting opinion); *United States v. Wilson*, 420 U.S. at 339-42; *United States v. Scott*, 437 U.S. 82, 87 (1978)).

The Double Jeopardy Clause was in part a response to the high potential for abuse inherent in allowing prosecutors a second chance to convict a defendant. English judges in the seventeenth century routinely engaged in the "'tyrannical practice' of discharging juries and permitting reindictment when acquittal appeared likely,"

thereby giving the Crown prosecutors an opportunity to strengthen their case and try the defendant again. *Crist v. Bretz*, 437 U.S. 28, 42 (1978) (Powell, J., dissenting) (citing *The Queen v. Charlesworth*, 121 Eng. Rep. 786, 801-02 (Q.B. 1861)). In response to this oppressive practice, English courts began to prohibit the dismissal of a jury once it was sworn. *Id.* at 42-43 (citing *The King v. Perkins*, Holt. 403, 90 Eng. Rep. 1122 (K.B.1698)). American courts later invoked this prohibition to protect against governmental oppression. Throughout the nineteenth century, "many state courts began to blend the rule against needless discharges of juries into the guarantee against double jeopardy contained in the Federal and State Constitutions." *Id.* at 45 (citing cases). "[T]he prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this 'abhorrent' practice [of discharging a jury for the purpose of benefiting the Crown]." *Arizona v. Washington*, 434 U.S. 497, 507-08 (1978) (citing *State v. Garrigues*, 2 N.C. 241 (N.C. Super. Ct. L. & Eq. 1795)).

As the Court noted in *United States v. Dinitz*, the Double Jeopardy Clause operates to protect defendants from oppressive governmental practices similar to those engaged in by Crown prosecutors and judges. *See* 424 U.S. 600, 611 (1976); *see also Arizona*, 434 U.S. at 508 ("[T]he strictest scrutiny is appropriate . . . when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused."); *Downum v. United States*, 372 U.S. 734, 736 (1963) ("Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy

attaches.") (citation omitted).

In *Green*, the Court affirmed the important purposes of the double jeopardy bar:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

355 U.S. at 187-88.

The Double Jeopardy Clause also protects against the risk that an innocent defendant may be convicted because the government can refine its case in serial prosecutions and reduce the defendant's ability to present an adequate defense. *See* Comment, *Twice in Jeopardy*, 75 Yale L.J. 262, 278 (1965) ("Without a rule of finality no procession of juries could effectively acquit a defendant, but a single jury could convict. The prosecutor could keep trying until he found an accommodating panel."). A prosecutor who is given a second chance can present a more effective case by learning from the mistakes of the first trial, reassembling his evidence, and remedying any deficiencies. The government might therefore use the first trial as a dry run, affording it a more favorable opportunity to convict the defendant. *See Ashe*, 397 U.S. at 447 (treating "the first trial as no more than a dry run for the second prosecution . . . is precisely what the constitutional guarantee forbids"); *see also* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy After Rodney*

King, 95 Colum. L. Rev. 1, 31 n.158 (1995) ("If you play with something long enough, you are likely to break it; and if the government is allowed to prosecute an innocent defendant enough times and disregard all acquittals, eventually it is likely to convict an innocent (by hypothesis) person.").

The need to limit governmental action in order to safeguard individual interests is also reflected by "society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant . . . manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws." *United States v. Jorn*, 400 U.S. 470, 479 (1971). A retrial, no matter the cause, exposes the defendant to the psychological and financial hardships of a second trial, and to an increased risk of conviction, even if he is innocent, due in large part to the prosecutor's use of the first trial as a learning experience.

The failure of a jury to reach a verdict does not in itself bar further prosecution; neither should it nullify the collateral estoppel effect of a jury's acquittal on a different count. The fundamental purpose underlying the Double Jeopardy Clause would be undermined if the Court affirms that hung counts cannot be barred by collateral estoppel because they introduce uncertainty into the *Ashe* analysis.

3. Yeager defended himself at a thirteen-week trial against 127 counts of conspiracy, securities fraud, wire fraud, insider trading, and money laundering. The jury acquitted him on all the lead counts and convicted him on none of the counts. The government reacted to the jury's verdicts and Yeager's motion to bar his reprosecution on the hung

counts by severing the defendants into three indictments so it could refine its case as to each group. In its Eighth Superseding Indictment, which named only Yeager as a defendant despite the prosecution's earlier insistence that all the defendants were participants in an overarching conspiracy and could not be severed, R-1780, the government brought some of the same insider trading charges it had already presented but refined them to avoid the failures of proof evidenced by the first jury's acquittals of Yeager. The charges in the new indictment, however, still rely on the same issue already decided in Yeager's favor—his possession of insider information at the time of the charged insider trading.

If the government is permitted to retry Yeager on the insider trading counts on which the first jury hung, it will have "the opportunity to marshal its evidence and resources more than once" and will have had the chance "to hone its presentation of its case through a trial." *Ohio v. Johnson*, 467 U.S. 493, 501 (1984). While there is no question that the government has a legitimate interest in prosecuting a hung count under appropriate circumstances, its attempt to ignore the effect of acquittals for collateral estoppel purposes, while tailoring a new indictment to avoid making the same mistakes with a second jury, is precisely the kind of abuse that collateral estoppel should prevent.

At the same time, the cost to Yeager of a retrial will be enormous. After already experiencing the emotional and financial hardship that necessarily accompanies an extended trial, Yeager will be forced to go through the process again, and without the benefit of the factual determination that the first jury made. Yeager will be forced to "run the gantlet"

a second time against a case the prosecution has already tested and refined through the course of the first trial. The concerns set out in *Green* support applying collateral estoppel to bar further prosecution on the hung counts.[2]

B. The Deferential Treatment Accorded To Jury Verdicts Is Furthered By Honoring Acquittals Through Their Application To Hung Counts.

1. Application of collateral estoppel to bar the hung counts is also compelled by the deferential treatment accorded to jury verdicts—a treatment rooted in respect for the jury's sovereignty. When a jury speaks through an acquittal, it is exercising its sovereign function to decide guilt or innocence. "[D]eference [to] the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *Powell*, 469 U.S. at 67. Applying the jury's determination of an ultimate issue of fact to the counts it failed to decide furthers this important protective role, honoring what the jury decided and appropriately refusing to give equivalent value to its failure to make a decision. The statement of the jury's will through its verdicts is a powerful expression of the

[2] If Yeager cannot be retried on the insider trading charges due to the collateral estoppel effects of the acquittals, the money laundering charges must also be dismissed, because with Yeager's acquittals on the conspiracy, securities fraud, and wire fraud charges, the remaining money laundering charges against him are now solely based on transactions using his alleged insider trading proceeds.

voice of the community that is entitled to great deference. Hung counts can make no such claim. Application of criminal collateral estoppel to hung counts is both consistent with and a necessary component of jury sovereignty.

The right to trial by jury existed in England for hundreds of years before the United States Constitution was written. *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968). The First Continental Congress declared in 1774 that it was "the great and inestimable privilege" of defendants to be "tried by their peers of the vicinage." *Id.* (citation omitted). The Declaration of Independence objected to the King's "depriving us in many cases, of the benefits of Trial by Jury." *Id.* And the right to trial by jury is the only guarantee to appear in both the Constitution and the Bill of Rights. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 870 (1994).

The modern jury continues to provide a vital safeguard to the rights of individual citizens against oppressive governmental practices. *Duncan*, 391 U.S. at 156; *see also Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *Williams v. Florida*, 399 U.S. 78, 100 (1970); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18-19 (1955).

The important role of juries is evidenced by the near absolute deference accorded to jury acquittals. Nowhere is this clearer than in the traditional power of a jury to refuse to convict even if the facts and law establish guilt. As this Court recognized in *Jones v. United States*, 526 U.S. 227, 245 (1999), the jury's "power to thwart Parliament and Crown took the form . . . of flat-out acquittals in the face of guilt . . . what Blackstone described as 'pious perjury' on the

jurors' part." (citing Blackstone, 4 Commentaries 238-39).

2. The Double Jeopardy Clause protects juror sovereignty by upholding the force of a verdict. *Arizona*, 434 U.S. at 503. A verdict of acquittal is final and not subject to appeal. *Ball v. United States*, 163 U.S. 662, 671 (1896). "The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'" *Arizona*, 434 U.S. at 503 (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)). "If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." *Id.* The prohibition of retrial following an acquittal is "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

3. *Powell* reaffirmed the deference accorded to acquittals by affirming the jury's right to render inconsistent verdicts. In *Powell*, a jury acquitted the defendant of conspiracy to possess and possession of cocaine, but convicted her of using the telephone in "committing and in causing" the same conspiracy and possession. 469 U.S. at 60. The jury's verdicts were clearly inconsistent, because Powell could not have used the telephone to further offenses she did not commit. This Court upheld the jury's verdicts, despite their facial inconsistency, because any analysis of the reasons for the verdicts "would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake." *Id.* at 66.

Moreover, Powell was asking an appellate court

to reverse the jury's conviction, which had as much validity as the acquittals on which she based her claim. Thus, the *Powell* Court found that it was "unclear whose ox has been gored" by the recognition of jury sovereignty: both the government and the defendant could point to verdicts supporting their position. *Id.* at 65. Each side was entitled to the finality that accompanies the jury's expression of its will through a verdict, whether that verdict was an acquittal or a conviction. The Court recognized that any attempt to determine why the jury acted as it did in rendering its verdicts would necessarily intrude on jury sovereignty.

4. *Powell* is consistent with the application of collateral estoppel in this case because a mixed verdict of acquittals and hung counts does not create the same inconsistency as a mixed verdict of acquittals and convictions. As numerous courts have held, "the jury's failure to reach a verdict is too inconclusive to qualify as inconsistent for the purposes of issue preclusion. The powerful double jeopardy protections that attach to acquitted counts should not be outweighed by the inconclusiveness inherent in hung counts." *United States v. Bailin*, 977 F.2d 270, 279-80 (7th Cir. 1992); *accord United States v. Seley*, 957 F.2d 717, 723 (9th Cir. 1992); *United States v. Frazier*, 880 F.2d 878, 882-883 (6th Cir. 1989). *But see United States v. White*, 936 F.2d 1326 (D.C. Cir. 1991).

Powell teaches that unlike the *Ashe* inquiry which is designed to determine the meaning of a jury's expression of its will by its verdicts—speculation about a jury's deliberations is both impractical and a suspect infringement of jury sovereignty, since such an analysis intrudes on the jury's deliberative process. *Powell*, 469 U.S. at 66.

As *Powell* put it, "[c]ourts have always resisted inquiring into a jury's thought processes." *Id.* at 67 (citing *McDonald v. Pless*, 238 U.S. 64 (1915); Fed. R. Evid. 606(b)).

The *Powell* Court's unwillingness to inquire into a jury's deliberative process to determine the basis for its verdict applies with equal force to any attempt to determine why a jury deadlocked on some counts. Here, the court of appeals burdened Yeager with the impossible task of demonstrating why the jury failed to acquit him on the hung counts. The court engaged in precisely the type of speculation forbidden by *Powell* when it postulated that, if the jury had in fact determined that Yeager did not possess insider information, it would have acquitted on all counts.

C. The Court's Criminal Collateral Estoppel Jurisprudence Has Developed As Modern Criminal Codes Have Become Increasingly Complex.

1. As the Court recognized in *Ashe*, criminal collateral estoppel is necessary because of the increasing complexity of the criminal code, which now contains "overlapping and related statutory offenses," allowing prosecutors to "spin out a startlingly numerous series of offenses from a single . . . criminal transaction." 397 U.S. at 445, n.10. The era of distinct offenses with little overlap between them has passed. *See, e.g.*, John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, 26 Heritage Foundation Legal Memorandum 1 (June 16, 2008) (cataloguing approximately 4,450 federal crimes and noting that Congress creates approximately 57 new crimes per

year). Today, what appears to be a single criminal act may be charged under several statutes. *See, e.g.*, *Texas v. Cobb*, 532 U.S. 162, 182 (2001) (Breyer, J., dissenting).

With overlapping crimes, the risk of prosecutorial overcharging increases. Collateral estoppel ensures that, when a jury determines an ultimate fact in the defendant's favor, the government cannot relitigate it under the guise of a violation of a different statute.

Jurors can be overwhelmed by complicated indictments charging multiple overlapping crimes. The inability or unwillingness of jurors to differentiate between hundreds of related counts charged under statutes with common elements may result in mixed verdicts of acquittals and unresolved counts. Here, the jury was asked to resolve 176 separate counts brought against five defendants. Yeager alone was charged in 127 counts.

In such cases, collateral estoppel provides the only reasonable way to resolve hung counts that share a common element with acquitted counts. If a jury's ability to reach unanimity is exhausted before it considers all of the counts in a lengthy indictment, its decisions to acquit on some counts must be applied to common factual issues on unresolved counts. Any other result rewards prosecutorial overcharging, which can overwhelm a jury and create an opportunity to retry a defendant even if the jury acquits on counts involving common factual issues.

2. As complicated criminal codes have developed, so has the Court's jurisprudence on criminal collateral estoppel. In a series of important rulings, the Court has shaped the doctrine of criminal collateral estoppel into a critical component of a defendant's rights under the Double Jeopardy

Clause.

This Court first recognized the importance of criminal collateral estoppel in *Oppenheimer*, 242 U.S. 85. In that case, Herman Oppenheimer was charged with a conspiracy to conceal assets from a trustee in bankruptcy. But he had previously been indicted for the same offense, and a court had ruled that the charge was barred by the statute of limitations. *Id.* at 86. The government claimed that "the doctrine of res judicata does not exist for criminal cases except in the modified form of the 5th Amendment, that a person shall not be subject for the same offence to be twice put in jeopardy of life or limb." *Id.* at 87. Attempting to limit the scope of the Fifth Amendment to exclude collateral estoppel, it argued that "a decision upon a plea in bar cannot prevent a second trial when the defendant never has been in jeopardy in the sense of being before a jury upon the facts of the offence charged." *Id.*

The Court rejected this argument: "It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." *Id.* The Court went on to note that, while the Fifth Amendment did not specifically address the application of collateral estoppel in criminal cases, it "was not intended to do away with what in the civil law is a fundamental principle of justice in order, when a man has once been acquitted on the merits, to enable the Government to prosecute him a second time." *Id.* at 88 (internal citations omitted).

3. In *United States v. Adams*, 281 U.S. 202 (1930), the Court reaffirmed the application of collateral estoppel to criminal cases, finding that

where the defendant had been acquitted of making a false statement, the jury's acquittal, which "was conclusive upon all that it decided," must be examined to see whether issues were necessarily determined that might preclude the defendant's prosecution on a different false statement charge. Since the acquitted false statement was not identical to the newly indicted count, the traditional principle of double jeopardy, in itself, did not bar the defendant's prosecution. *Id.* at 205. Instead, the question was whether the jury's determination collaterally estopped the new count. *See id.* (citing *Oppenheimer*, 242 U.S. 85). After analyzing the acquittal, the Court found that the new false-report count was not barred by collateral estoppel, because the earlier acquittal did not determine an issue essential to the pending count. *See id.*

4. In *Sealfon*, the defendant was charged in two indictments. 332 U.S. at 576-79. The first charged him with conspiring to defraud the United States by submitting false documents relating to sugar rationing, while the second charged him with substantive acts of submitting the false documents under an aiding-and-abetting theory. *Id.*

Central to both indictments was Sealfon's letter to a codefendant, Greenberg, falsely stating that Sealfon was selling vanilla syrup exempt from rationing. The conspiracy theory was that Sealfon agreed to send Greenberg the letter so that Greenberg could sell Sealfon more sugar than would otherwise be allowed, which Sealfon in turn would sell to non-exempt buyers. *Id.* at 576-77. At Sealfon's first trial, on the conspiracy charge, the central issue was whether he agreed to send the letter as part of the conspiracy. The jury acquitted, thereby necessarily determining that Sealfon, "who

concededly wrote and sent the letter, did not do so pursuant to an agreement with Greenberg to defraud." *Id.* at 580. Sealfon was then tried on the substantive counts, on the theory that he aided and abetted Greenberg by writing the letter, and he was convicted.

The Court reversed the conviction on collateral estoppel grounds. Although the commission of a substantive offense and the conspiracy to commit it "are separate and distinct offenses," the Court, citing *Oppenheimer* and *Adams*, held that collateral estoppel "may be a defense in a second prosecution" and "operates to conclude those matters in issue which the verdict determined though the offenses be different." *Id.* at 578 (citations omitted).

The government urged that "the basis of the jury's verdict cannot be known with certainty" and posited that the jury might have decided nothing more than that Sealfon was not guilty of conspiracy. *Id.* at 579. But the Court laid the foundation for *Ashe* by rejecting this technical approach, responding that "[t]he instructions under which the verdict was rendered . . . must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. We look to them only for such light as they shed on the issues determined by the verdict." *Id.* The second indictment "was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do." *Id.* at 580.

5. Several years later, *Ashe* presented the Court with facts displaying the risks of prosecutorial overreaching by forcing a criminal defendant to defend against identical factual allegations in

successive prosecutions, where the government could refine its case and wear down the defendant. Six men were playing poker when "three or four masked men" broke in and robbed the players. *Ashe*, 397 U.S. at 437. The police arrested four men for the crime, including Ashe. *Id.* The government charged all the men with six counts of robbery (one for each poker player) and tried Ashe first for the robbery of one of the players. *Id.* at 438. At trial, the evidence was clear that a robbery occurred, but the evidence that Ashe was one of the robbers was weak. *Id.* The jury acquitted Ashe in a general verdict. *Id.* at 439.

The government then proceeded to a second trial in which Ashe was charged with the robbery of a second poker player. *Id.* At the second trial, "[t]he witnesses were for the most part the same, though this time their testimony was substantially stronger on the issue of the petitioner's identity." *Id.* at 439-40. The government also "refined" its case by declining to call a witness "whose identification testimony at the first trial had been conspicuously negative." *Id.* at 440. This time, the jury found Ashe guilty. *Id.*

After setting out the "realism and rationality" test and the reasons why a non-technical analysis of what the jury decided was necessary to preserve criminal collateral estoppel, the court evaluated the record and concluded that Ashe's second trial was barred by collateral estoppel because "[t]he single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the [first] jury by its verdict found that he had not." *Id.* at 445.

Finally, the Court stated its concern over the government's efforts to hone its case through successive efforts to prove the same facts: "In this

case, the State in its brief has frankly conceded that, following the petitioner's acquittal, it treated the first trial as no more than a dry run for the second prosecution. . . . But this is precisely what the constitutional guarantee forbids." *Id.* at 447.

6. *Dowling v. United States*, 493 U.S. 342 (1990), dealt with evidentiary issues about the admissibility of acquitted conduct in later proceedings. *Dowling* distinguished the use of evidentiary facts arising out of a prior acquittal from a complete bar of reprosecution, but did not alter the *Ashe* approach to determining the collateral estoppel effects of acquitted counts on counts sharing ultimate issues of fact. In fact, *Dowling* reaffirmed the *Ashe* test, finding that, even if *Ashe* applied to preclude the use of evidentiary facts, Dowling had failed to meet his burden of establishing that the evidence the government sought to introduce at his subsequent trial had even been contested, much less necessarily decided, by the jury that acquitted him of an unrelated crime. *Id.* at 348. The mere fact that the admitted testimony related to evidence at a prior trial in which Dowling was acquitted was insufficient to raise double jeopardy concerns: "unlike the situation in *Ashe v. Swenson*, the prior acquittal did not determine an ultimate issue in the present case." *Id.* at 348.

7. The *Ashe* test established a practical method to determine what a jury necessarily decided and to fully implement a jury's acquittal. As the court of appeals found here, the jury necessarily decided that Yeager did not possess the insider information he allegedly used in the pending insider trading counts. Under this Court's collateral estoppel jurisprudence and the traditional deference given to jury acquittals, that finding must be applied to bar the

pending charges.

II. Hung Counts Should Not Be Given Any Weight In The *Ashe* Test.

A. Consideration Of Hung Counts Is Inconsistent With Historical Practice.

1. In contrast to the deference given to acquittals as an expression of a jury's sovereignty, there is no equivalent deference given to a jury's inability to speak its will. Hung counts simply have not been viewed as decisions by the jury, and are not entitled to the deference usually accorded to those decisions. The Court therefore should not adopt a rule that allows consideration of hung counts as part of the *Ashe* analysis. In a mixed verdict of acquittals and hung counts, consideration of the hung counts as if they were decisions inconsistent with the acquittals would violate the protection against double jeopardy by allowing the government to relitigate issues that have already been resolved in the defendant's favor.

Unlike the task of discerning the basis for a jury's acquittals, examining hung counts to understand their basis is necessarily a fruitless endeavor because of the limitations traditionally placed on inquiring into a jury's deliberations. When the burden of identifying the reason for the jury's hung verdict is placed on the defendant as it was on Yeager by the court of appeals the defendant will never be able to establish what the jury necessarily decided. The result would be that criminal collateral estoppel could never apply to hung counts. Attributing decisional significance to a jury's inability or unwillingness to reach a verdict, as the court of appeals did here, would elevate the jury's

failure to render a decision to the equivalent of its *complete verdicts* of acquittal and would be inconsistent with both the favored status of verdicts and the hostility toward hung counts.

2. Mistrials caused by hung juries were a rare and disfavored occurrence when the Constitution and Bill of Rights were adopted. As a result, Constitutional questions about hung counts must be viewed in the light of the Framers' views on the role of jury verdicts and the protection against being held twice in jeopardy. *Cf. Apprendi v. New Jersey*, 530 U.S. 466, 518 (2000) (Thomas, J., concurring) ("Today's decision, far from being a sharp break with the past, marks nothing more than a return to the *status quo antc* the status quo that reflected the original meaning of the Fifth and Sixth Amendments."). At common law, an empanelled jury could not be dismissed before it rendered a verdict. "A jury sworn and charged in case of life or member, cannot be discharged by the court or any other, but they ought to give a verdict." 1 E. Coke, Institutes 227(b) (6th ed. 1681). The rule against discharge before verdict appears to have originated in the medieval English practice of drawing the jury from the vicinage in which the crime was alleged to have been committed. Marion S. Kirk, *Jeopardy During the Period of the Year Books*, 82 U. Pa. L. Rev. 602, 609-12 (1934). Since jurors were chosen for their personal knowledge of the facts, each jury was uniquely qualified to decide the case before it, and therefore finality was required. *Id.* at 612.

The English courts used coercive techniques to ensure that each jury reached a unanimous verdict. During deliberations, jurors were deprived of "meat, drink, fire, or candle, . . . till they are all unanimously agreed." Blackstone, 3 Commentaries

375 (1978). And "if the jurors do not agree in their verdict before the judges are about to leave the town, . . . the judges are not bound to wait for them, but may carry them round the circuit from town to town in a cart." *Id.* at 376. Unsurprisingly, English juries decided cases quickly, sometimes hearing twelve or more trials in succession before retiring to decide all the cases at once. J.M. Beattie, Crime and the Courts in England, 1660-1800 395 (1986).

By the 1730s, juries left the courtroom to deliberate where the issues were especially complex but typically deliberated for no more than a few minutes. *Id.* at 396-99. The English practice of forcibly detaining a criminal jury unable to reach a unanimous verdict without food or drink, and without heat in the winter, persisted until 1870. *See* William Forsyth, History of Trial by Jury 201 (Lawbook Exchange, Ltd. 2d ed. 1994) (1974).

Early American juries were subjected to similar coercive tactics. "Judges used to urge deadlocked juries to resolve their disagreements through such coercive measures as the denial of food and drink, excessive deliberation hours, and the threat of confinement." Saul M. Kassin, *The American Jury: Handicapped in the Pursuit of Justice*, 51 Ohio St. L.J. 687, 709 (1990). These juries returned verdicts in nearly all cases, and ordinarily did so with little or no deliberation. Daniel D. Blinka, *Trial by Jury on the Eve of Revolution: The Virginia Experience*, 71 UMKC L. Rev. 529, 577-78 (2003). Consequently, mistrials caused by hung juries were virtually nonexistent in colonial America. No mistrials occurred, for example, in New Jersey criminal cases from 1749 to 1757. *See* George C. Thomas III, *Colonial Criminal Law and Procedure: The Royal Colony of New Jersey*, 1749-57, 1 N.Y.U. J. L. &

Liberty 671, 703-04, tbl.1 (2005). And in Virginia in the mid-eighteenth century, less than one jury per year was unable to reach a verdict. Blinka, 71 UMKC L. Rev. at 580.

3. This Court has consistently acknowledged the importance of considering criminal practices as they existed in the thirteen colonies and England when the Bill of Rights was adopted when evaluating the proper function of the jury, as guaranteed by constitutional provisions such as the Sixth Amendment. *See Crawford v. Washington*, 541 U.S. 36, 43-50 (2004).

The Court's decisions recognize the need to conform the jury's historical function to the realities of the contemporary disputes presented to them. When a court is "faced with the issue of preserving an ancient guarantee under a new set of circumstances," it should ensure "that the jury [will] still stand between the individual and the power of the government." *See United States v. Booker*, 543 U.S. 220, 237 (2005). Because hung juries were a rarity when the Bill of Rights was adopted, the Framers did not focus on them when they considered limiting the power of the government to twice hold a defendant in jeopardy.

4. The development of complex criminal codes, however, increased the likelihood that a jury would be unable to reach a verdict. As hung counts became more prevalent, courts struggled with whether retrial was barred by the Double Jeopardy Clause following dismissal of a hung jury. Many of the courts that initially considered the question held that a defendant could not be subjected to a second trial following the discharge of a hung jury. *See, e.g.*, *Garrigues*, 2 N.C. at 242 (hung jury found to be "strong evidence of the party's innocence" precluding

retrial).

The first known mistrial in an American federal court based on a jury's inability to agree on a verdict occurred in 1807. *See United States v. Workman*, 28 F. Cas. 771 (D. La. 1807). That court, while describing the notion as obsolete, acknowledged the existence of a "general doctrine prohibiting the discharge of a jury in all cases." *Id.* at 773. Shortly thereafter, this Court settled the issue, holding that a jury could be discharged before verdict only in situations of "manifest necessity." *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). The Court cautioned that the power to declare a mistrial when the jury could not reach a verdict "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner." *Id.* The issue of whether courts had authority to discharge a jury prior to verdict persisted even after *Perez*. Janet E. Findlater, *Retrial After a Hung Jury: The Double Jeopardy Problem*, 129 U. Pa. L. Rev. 701, n.20 (1981) (citing cases). While hung counts were then tolerated, they were certainly not encouraged, and courts attributed no meaning to them.

5. By the mid-nineteenth century, American courts abandoned the physically coercive tactics employed at common law to force complete verdicts, and instead began instructing deadlocked jurors to reach a verdict even if it required a reexamination of their beliefs. While the strategy may have changed, the objective of obtaining a unanimous verdict remained the same.

In *Allen v. United States*, the Court approved

instructing a jury "that it was their duty to decide the case if they could conscientiously do so" and that any dissenting juror "should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself." 164 U.S. 492, 501 (1896).

In approving an instruction that explicitly directed dissenting jurors to reassess their conclusions in the hopes of reaching a unanimous verdict, the Court emphasized that "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Id.* The Court has repeatedly affirmed the holding in *Allen*. *See Jones v. United States*, 527 U.S. 373, 382 (1999) (the "very object of the jury system is to secure unanimity" and a hung verdict is "a breakdown in the deliberative process"); *Lowenfield v. Phelps*, 484 U.S. 231 (1988).

The *Allen* line of cases demonstrates the judiciary's continuing belief that a jury should be encouraged to reach a unanimous verdict. *See* Kassin, 51 Ohio St. L.J. at 709 ("The [*Allen*] charge and the relaxation of a unanimous verdict requirement are driven by a contempt for the hung jury and the costs incurred by a mistrial.").

A hung count is not an exercise by the jury of its exercise of sovereign power; it merely demonstrates a failure to exercise that power. Judicial efforts to encourage a jury to utilize its power to convict or acquit demonstrate that it is only the definitive expression of a jury's will that can be credited. The corollary, that a jury's failure to reach a verdict can be given no weight in determining what it decided, is equally important.

B. Courts Do Not Attribute Decisional Significance To Hung Counts.

1. This Court has never attributed any meaning to hung counts. In *Perez*, the defendant was tried for a capital offense, and "the jury, being unable to agree, were discharged by the Court from giving any verdict upon the indictment." 22 U.S. (9 Wheat.) at 579. After noting that a court should discharge a jury only in a case of manifest necessity, the Court held that the jury's failure to reach a verdict was not a decision about the charges against the defendant, "since the prisoner has not been convicted or acquitted, and may again be put upon his defence." *Id.* at 580.

The majority of courts of appeals to consider the issue has held that hung counts should be given no weight in a collateral estoppel analysis.[3] The Sixth, Seventh, Ninth, and Eleventh Circuits agree that the failure of a jury to reach agreement on some counts cannot deprive an acquittal of collateral estoppel consequences. *See United States v. Ohayon*, 483 F.3d 1281 (11th Cir. 2007); *United States v. Romeo*, 114 F.3d 141, 144 (9th Cir. 1997); *Bailin*, 977 F.2d at 276; *Frazier*, 880 F.2d at 885-86. The Second Circuit has similarly recognized that hung counts do not create an inconsistency that prevents the application of collateral estoppel. *See United States v. Citron*, 853 F.2d 1055, 1059 (2d Cir.

[3] The First and District of Columbia Circuits, applying *Powell*, have concluded that when acquittals and hung counts share a common element, there is an inconsistency between them that prevents application of collateral estoppel to the hung counts. *See United States v. Aguilar-Aranceta*, 957 F.2d 18, 24-25 (1st Cir. 1992); *White*, 936 F.2d 1326.

1988) ("[A]n acquittal accompanied by a failure to reach a verdict may appropriately give rise to collateral estoppel if the acquittal necessarily determined facts in the defendant's favor . . . .").[4]

These courts agree that the *Ashe* collateral estoppel analysis must focus on the counts on which the jury actually reached a verdict, because consideration of why the jury failed to reach a verdict on other counts requires speculation inconsistent with *Ashe* and *Powell*. The inconclusiveness inherent in a hung count makes it impossible to find an inconsistency between an acquittal and a hung count, and therefore, "when a jury acquits on some counts in a multicount indictment, principles of collateral estoppel may preclude retrial of charges upon which the jury was unable to agree at the earlier trial." *Frazier*, 880 F.2d at 883.

"Because there are so many variable factors which can cause a jury not to reach a verdict," a court should not "speculate on why the jury could not agree. The inquiry under *Ashe* is what the jury actually decided when it reached its verdict, not on why the jury could not agree on the deadlocked count." *Romeo*, 114 F.3d at 144. The Seventh Circuit held in *Bailin* that:

[4] The Court of Appeals of Maryland follows the majority rule as well. *See Ferrell v. State*, 567 A.2d 937, 944 (Md. 1990). The Fourth and Eighth Circuits have not specifically addressed whether the presence of hung counts bars collateral estoppel, but have conducted an *Ashe* analysis even when the jury hung on some counts, implying that the mere presence of hung counts does not prevent the application of collateral estoppel. *See United States v. Goodine*, 400 F.3d 202, 209-10 (4th Cir. 2005); *United States v. Bearden*, 265 F.3d 732, 735-36 (8th Cir. 2001).

> [T]he jury's failure to reach a verdict is too inconclusive to qualify as inconsistent for the purposes of issue preclusion. The powerful double jeopardy protections that attach to acquitted counts should not be outweighed by the inconclusiveness inherent in hung counts.

977 F.2d at 279-80. Most recently, in *Ohayon*, the Eleventh Circuit rejected the notion that the jury's verdicts could have resulted from juror error, "[b]ecause we ask what a rational jury would have done." 483 F. 3d at 1288. Similarly, the court refused to consider whether the jury had simply nullified by refusing to convict on a hung count because, "[w]hile the possibility of jury nullification may influence the strategy of trial lawyers, it cannot enter into the analysis of courts making collateral estoppel inquiries." *Id.*

Ohayon also rejected the government's argument "that we should search for the basis of a mistried count," holding "that the search for the basis of a mistried count *will necessarily be in vain*." *Id.* at 1289 (emphasis added). The court added, "[i]n truth, the failure of a jury to reach a verdict is not a decision; it is a failure to reach a decision. A partial verdict does not comprise two decisions that we must try to reconcile, because the mistried count is not a decision for which we can discern, or to which we can impute, a single, rational basis." *Id.* at 1289-90.

2. In *Richardson v. United States*, 468 U.S. 317 (1984), this Court refused to attribute any decisional significance to hung counts. The jury acquitted Richardson on one of three counts of narcotics violations but hung on the remaining counts. *Id.* at 318-19. Richardson then moved to dismiss the hung

counts, claiming that the government's failure to submit sufficient evidence to convict on these counts barred his retrial. *Id.* at 321. Like the government in this case, Richardson attempted to attribute decisional significance to the jury's failure to reach a verdict.

The Court refused to attribute any decisional significance to the hung counts, holding that double jeopardy "applies only if there has been some event, such as an acquittal, which terminates the original jeopardy." *Id.* at 325. Therefore, "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy," even where there has been an acquittal on another count. *Id.* at 326. The Court rejected the notion "that a hung jury is the equivalent of an acquittal." *Id.* at 325. Therefore, Richardson could not use the jury's failure to reach a verdict as an indication that it must have been presented with insufficient evidence. *Id.* at 325-26. Notably, Richardson never argued that his acquittal by the jury collaterally estopped his reprosecution on the hung counts.

3. In its argument to the court of appeals, the government started with the *Richardson* holding that the mistrial of a count does not bar a retrial on that count and made the leap that if "the Double Jeopardy Clause does not protect a defendant against a retrial on a hung count when the evidence as to that very count is insufficient, it makes little sense to conclude a defendant should be able to bar his retrial because of the jury's verdict on other counts." Appellee's Br. at 24.

This argument conflates traditional double jeopardy and the related doctrine of collateral estoppel. Traditional double jeopardy principles prevent the government from trying a defendant for

the same crime of which he has previously been convicted or acquitted. This doctrine is rooted in the common law pleas of *autrefois acquit* and *autrefois convict*. Collateral estoppel, on the other hand, applies when an acquittal on one count resolves a factual issue on a wholly different count. In *Ashe*, the second prosecution was not prohibited by traditional double jeopardy, because the robbery of the first poker player was not the same crime as the robbery of the second poker player; instead, it was prohibited by collateral estoppel. Thus, to accept the government's argument that the doctrines are coterminous would be to overrule *Ashe*.[5] Whatever *Richardson* has to say about traditional double jeopardy principles, it was not a collateral estoppel case.

As in *Richardson*, the Court here should find that the hung counts decided nothing about the charges against Yeager. Under *Ashe*, it should look to the acquittals to determine the effect of the jury's verdict. The court of appeals would place an impossible burden on defendants by requiring them to explain the reason why a jury hung. This task is necessarily fruitless, because hung counts have no decisional significance. As a practical matter, it is also impossible, because well-established policies prevent inquiries into jury deliberations or speculation about why a jury hung. This Court should reverse, because double jeopardy is simply too important a right to be left to speculation or constrained by impossible burdens.

[5] In *Bailin*, 977 F.2d at 275, the court of appeals rejected this very argument, holding that it required reversal of *Ashe* and would mean that collateral estoppel never applied. *Id.*

III. Yeager Established That An Essential Element Of The Pending Charges Was Decided In His Favor By The Jury's Acquittals.

1. The court of appeals concluded that, when the hung counts were not considered, the *Ashe* test established that Yeager did not possess insider information. But the court of appeals went on to give decisional significance to the jury's failure to act on those counts. In elevating the jury's failure to decide to the same significance as the clear expression of its will in its acquittals, the court of appeals placed itself at odds with the long history of according great deference to acquittals. At the same time, the court created a nearly impossible standard for criminal defendants invoking the protections of collateral estoppel. In all but the rarest of circumstances, they will not be able to demonstrate why a jury *failed* to reach a verdict. Here, Yeager was precluded from interviewing the jurors and thus lacked any ability to meet the burden imposed on him. *See* Pet. App. 67a.

2. The court of appeals was correct that when the acquittals are considered without giving any weight to the hung counts, "collateral estoppel bars a retrial," because the record shows that the jury determined that Yeager did not possess insider information. Pet. App. 21a-22a. As in *Ashe*, where the jury was asked to determine whether Ashe was in fact one of the robbers, the jury in this case faced a stark choice. The government presented the charges against Yeager as seamless and unified, and it encouraged the jury to accept or reject them wholesale. The district court also recognized that Yeager's defense theory was an all-or-nothing good-

faith defense "that he believed in the business plan, believed the network operated properly, applied for a patent, and that he worked hard to make things work." Pet. App. 55a-56a.

Faced with two alternatives, the jury rejected the government's theory and decided that since Yeager believed in EBS and its products and services, he could not have possessed the insider information. Yeager simply could not have simultaneously held the belief that all was well at EBS, while also holding the radically different view of its failure attributed to him in the government's case. The insider information he allegedly traded on was nothing more than the knowledge that statements at the 2000 Analysts Conference and in press releases were false. Consequently, by acquitting Yeager of the securities fraud charge, the wire fraud charges, and the conspiracy related to both, the jury rejected the government's failure-to-disclose theory and accepted his good-faith defense.

3. The government crafted the Fifth Superseding Indictment to include a failure-to-disclose theory in each of the counts on which the jury acquitted Yeager. The government urged the jury to convict Yeager if the truth about EBS was left out of the charged press releases or the presentation at the 2000 Analysts Conference, even if he did not make or cause any false statements. R-20320, R-13593-94.

The district court instructed the jury to consider in its decision on the securities fraud count whether Yeager failed to disclose material information in his possession. J.A. 104-05. With its acquittal on that count, the jury found that Yeager did not make either false statements *or material omissions* at the 2000 Analysts Conference. J.A. 25. Yeager's acquittals on the wire fraud charges relating to the

press releases were also rejections of both the misrepresentations and the failure-to-disclose theory. When charging the jury on wire fraud, the district court included failure to disclose as a basis for liability, just as it did for the securities fraud and conspiracy counts: "A representation would also be 'false' when it constitutes a half-truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud." J.A. 117.

This same failure to disclose the "truth" about EBS was the core of the insider trading charges. Insider trading qualifies as a "deceptive device" under § 10(b) of the Securities Exchange Act of 1934 because a relationship of trust between insiders of a corporation and the shareholders creates "a *duty to disclose or to abstain from trading* because of the necessity of preventing a corporate insider from taking unfair advantage of uninformed stockholders." *United States v. O'Hagan,* 521 U.S. 642, 652 (1997) (emphasis added). The failure to disclose the insider information is the key element of insider trading—if the information were disclosed to the public, the trading would not be "insider" trading. *See Dirks v. SEC*, 463 U.S. 646, 654 (1983) ("[A]n insider will be liable under Rule 10b-5 for inside trading only where he fails to disclose material nonpublic information before trading on it and thus makes 'secret profits.'"); *see also Chiarella v. United States*, 445 U.S. 222, 231 (1980).

The government's failure-to-disclose theory of insider trading was evident in its opening statement, in which the prosecutor described Yeager's role at the 2000 Analysts Conference:

> Now, Scott Yeager barely said a word during that presentation. . . . He knew they were

> going to present a false picture to the analysts. He chose to let that go forward and for the public to be none the wiser. And you will see that he profited directly and handsomely from that choice.

R-5716.

When Yeager sought particularity on the insider trading charges, *see* R-1649, the government provided an informal bill of particulars, R-21724, stating that "the material omissions made by the defendants and their co-conspirators *encompass the same issues* as the affirmative factual statements that have already been identified" in an earlier letter describing the affirmative misrepresentations in the press releases and at the 2000 Analysts Conference. R-21724-25. The government thus clarified that the failure to cure misrepresentations at the 2000 Analysts Conference and in press releases constituted the alleged criminal omissions.

The letter also listed failures to disclose at the 2000 Analysts Conference, including the striking claim that the defendants omitted the fact that "EBS executives were . . . planning to sell stock despite being in possession of material, non-public information." R-21726. In other words, Yeager allegedly failed to disclose that he was planning to engage in insider trading.

4. In accordance with the court's instructions, the jury had to convict Yeager on the securities fraud, wire fraud and conspiracy counts if it found that Yeager knew the "truth" about EBS and failed to disclose it at the time of the 2000 Analysts Conference, the issuance of the press releases, or when he traded Enron stock. If the jury determined that Yeager sat at the 2000 Analysts Conference,

with full knowledge that significant false statements were made and said nothing as "the technological capabilities, the value, the revenue, and the business performance of EBS" were misrepresented, R-21325, it would have convicted him of securities fraud. Similarly, the jury would have convicted Yeager of wire fraud if it found that he knew that the press releases were false, and that he failed to disclose the truthful information that would correct these misstatements. The only realistic interpretation of the jury's verdict is that it determined that Yeager did not believe that these statements were false and therefore did not possess the inside information that the government claimed.

The jury's rejection of the government's failure-to-disclose theory reaches all of the insider trading charges in the Eighth Superseding Indictment because all of the charged trades occurred after the 2000 Analysts Conference but before the last allegedly false press release. Accordingly, Yeager was acquitted of failing to disclose insider information throughout that entire period.

Even though the jury determined that Yeager did not possess and fail to disclose insider information during this period, the government charged in the Eighth Superseding Indictment that Yeager failed to disclose that very same insider information in connection with charged trades that are all within the same four-month period. The following chart illustrates this temporal overlap. **Bold** text shows when Yeager allegedly failed to disclose inside information in trades, and *italicized* text shows when Yeager was acquitted of failing to disclose that very same information:

Date of Charged Conduct (all in the year 2000)	Count	Current Status
January 20	*Count Two of Fifth Superseding Indictment*	*Acquitted of failing to disclose inside information*
January 21	**Count One of Eighth Superseding Indictment**	**Charged with trading on inside information**
January 31	*Count Three of Fifth Superseding Indictment*	*Acquitted of failing to disclose inside information*
March 22	**Count Two of Eighth Superseding Indictment**	**Charged with trading on inside information**
March 30	*Count Four of Fifth Superseding Indictment*	*Acquitted of failing to disclose inside information*
April 11	*Count Five of Fifth Superseding Indictment*	*Acquitted of failing to disclose inside information*
April 12	**Count Three of Eighth Superseding Indictment**	**Charged with trading on inside information**

May 10	**Count Four of Eighth Superseding Indictment**	**Charged with trading on inside information**
May 11	**Count Five of Eighth Superseding Indictment**	**Charged with trading on inside information**
May 15	*Count Six of Fifth Superseding Indictment*	*Acquitted of failing to disclose inside information*

The government's position that the jury's verdict allows it to reprosecute Yeager for insider trading during this period flies in the face of the jury's rejection of the government's failure-to-disclose theory. For example, the government now seeks to convict Yeager of trading on inside information on May 10 and 11, 2000, even though a jury has already determined that he did not possess and fail to disclose *that very same information* when a press release was issued four days later on May 15.

The government offered the jury several different ways to convict Yeager of conspiracy, securities fraud, and wire fraud based on a failure to disclose, but the jury rejected them all. Because the jury found that Yeager did not fail to disclose the specified inside information through the entire relevant period in early 2000, that verdict collaterally estops the government from trying to prove that he used that same information to trade in Enron stock during the same time period.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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January 12, 2009

RESPONDENT'S BRIEF

No. 08-67

In the Supreme Court of the United States

F. SCOTT YEAGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, under the collateral estoppel component of the Double Jeopardy Clause, the jury's verdict that petitioner was not guilty on some counts bars the government from retrying petitioner on other counts on which the jury was unable to reach a verdict.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 521 F.3d 367. The opinion of the district court (Pet. App. 29a-66a) is reported at 446 F. Supp. 2d 719.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2008. A petition for rehearing was denied on April 14, 2008 (Pet. App. 68a-70a). The petition for a writ of certiorari was filed on July 14, 2008 (Monday), and was granted on November 14, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

In November 2004, petitioner was charged in a fifth superseding indictment with conspiracy to commit wire

fraud and securities fraud, in violation of 18 U.S.C. 371; securities fraud, in violation of 15 U.S.C. 78j(b) (1994), 15 U.S.C. 78ff (2000), and 17 C.F.R. 240.10b-5; four counts of wire fraud, in violation of 18 U.S.C. 1343 (2000); 20 counts of insider trading, in violation of 15 U.S.C. 78j(b) (1994), 15 U.S.C. 78ff (2000), and 17 C.F.R. 240.10b-5; and 99 counts of money laundering, in violation of 18 U.S.C. 1957 (2000). J.A. 6-26, 31-32, 37-56. After a trial in the United States District Court for the Southern District of Texas, the jury found petitioner not guilty on the conspiracy, securities fraud, and wire fraud charges. J.A. 161-162. The jury failed to reach a verdict on the other counts, and the district court declared a mistrial on those counts. Pet. App. 4a.

Thereafter, in November 2005, the government obtained an eighth superseding indictment charging petitioner with five counts of insider trading, in violation of 15 U.S.C. 78j(b) (1994), 15 U.S.C. 78ff (2000), and 17 C.F.R. 240.10b-5; and eight counts of money laundering, in violation of 18 U.S.C. 1957 (2000). J.A. 188-200. All of the charges in the eighth superseding indictment were counts from the fifth superseding indictment on which the jury had not reached a verdict. Pet. App. 31a-34a. Petitioner moved to dismiss all of the counts on the ground that the collateral estoppel component of the Double Jeopardy Clause barred further prosecution. *Id.* at 4a-5a & n.4. The district court denied the motion. *Id.* at 29a-66a. The court of appeals affirmed. *Id.* at 1a-28a.

1. Between 1998 and 2001, petitioner was the Senior Vice President of Strategic Development at Enron Broadband Services (EBS), a unit of Enron Corporation (Enron) engaged in the telecommunications business. J.A. 6-8; Tr. 1493-1494, 1496, 1638. During that time, EBS sought to develop an advanced fiber-optic commu-

nications network known as the Enron Intelligent Network (EIN), which was to include a network control software layer that would provide the "intelligence." The fifth superseding indictment alleged that petitioner and several co-defendants purposely sought to deceive the public and drive up the price of Enron stock by making false statements about EBS's progress on the EIN while at the same time enriching themselves by selling millions of dollars of Enron stock. J.A. 6-20.

a. The conspiracy count charged that petitioner—along with others, including co-defendants Joseph Hirko and Rex Shelby, who were also senior officers at EBS—purposely sought to deceive the public about the technological capabilities, value, revenue, and business performance of EBS. J.A. 6-24. The conspirators allegedly executed their scheme to defraud by "(i) causing Enron to issue materially false and misleading press releases; (ii) making and causing others to make materially false and misleading statements to equity analysts and others; (iii) using fraudulent means to generate revenue so that EBS and Enron could appear to reach publicly declared financial targets; and (iv) failing to disclose material adverse information about EBS's poor business performance." J.A. 9. More specifically, petitioner, Hirko, Shelby, and others allegedly made or caused to be made false and misleading statements about EBS's development of the EIN and network control software at Enron's annual equity analyst conference in 2000 and in press releases before and after the conference. J.A. 10-13. At the same time, petitioner, Hirko, and Shelby allegedly sold large quantities of Enron stock, generating huge profits for themselves. J.A. 9, 20.

The securities fraud count charged that petitioner, together with Hirko and Shelby and others, committed

securities fraud by making false statements about EBS and the technological capabilities of the EIN and related software at the analyst conference. J.A. 6-20, 22, 25. The wire fraud counts charged that, after the conference, petitioner, along with Hirko and Shelby and others, caused Enron to issue four materially false and misleading press releases about EBS. J.A. 13, 22, 26. The insider trading counts charged that petitioner, while in possession of material, non-public information about the technological capabilities, value, revenue, and business performance of EBS and Enron, sold more than $54 million worth of Enron stock. J.A. 6-20, 31-32. The money laundering counts charged that petitioner knowingly engaged in monetary transactions in criminally derived property worth more than $10,000 with the proceeds of the alleged frauds and insider trading. J.A. 6-20, 37-56.[1]

b. The evidence at trial showed that petitioner attended meetings, exchanged e-mails, and participated in planning and preparing the presentation on EBS at the 2000 analyst conference. Tr. 1627-1629, 1735-1736, 1745, 1796. Petitioner helped craft an explanation of how the EIN would resolve problems with existing Internet and telecommunications technology. Tr. 1710-1711. In the months preceding the presentation, petitioner and other EBS employees had internal discussions about technological problems with the EIN and related products, as

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[1] The court of appeals focused its collateral estoppel analysis on the jury's acquittal on the securities fraud count. See Pet. App. 21a-22a & n.20. If that acquittal precludes retrial on the insider trading counts, it will also bar retrial on the money laundering counts because they are based on transactions with the proceeds of petitioner's alleged insider trading. See *id.* at 21a n.19. Accordingly, the discussion in this brief of the evidence at trial concentrates on the evidence relevant to the securities fraud and insider trading counts.

well as organizational problems at EBS. Tr. 1423, 1535, 1542-1548, 1761, 1766, 1772-1773, 1792-1793, 1798-1799, 1813-1816, 1835, 3569-3573, 3592-3598, 3634-3638, 3656-3678; see Pet. App. 53a-54a. Petitioner attended the EBS portion of the conference, but he did not make a presentation. Tr. 1795-1796.

The EBS presentation was made by co-defendants Hirko and Shelby, as well as Jeffrey Skilling, Enron's chief operating officer, and Kenneth Rice, one of EBS's chief executive officers. J.A. 8; Tr. 1430, 1626-1627, 1709-1710. Hirko, Shelby, Skilling, and Rice made numerous claims about the technological capabilities and performance of the EIN and related products. Tr. 1780-1805, 1810-1835, 1841-1850. Among other things, they claimed that EBS had developed advanced network control software with unique features that made the EIN superior to the networks of EBS's competitors. Tr. 1419-1430, 1791-1792, 1813-1817, 1830-1834, 2812-2819.[2]

The government introduced evidence at trial to prove that EBS had not yet fully developed the advanced network control software layer and that the EIN did not possess most of the advanced features and capabilities claimed during the presentation at the conference. Tr. 926-934, 1116-1117, 1152-1157, 1207-1209, 1220, 1565, 1596-1597, 1605-1606, 1711-1717, 1753-1766, 1835-1836, 2788-2789, 2791-2795, 2799-2801, 2812-2823, 3198-3217,

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[2] At trial, the government introduced two videotapes of the conference. Tr. 1419-1420, 1782-1783; Gov't Exhs. V-1-20-00 A and B. Rice testified on direct examination that a video made by Shelby about EBS's Broadband Operating System software that was included on the second videotape was shown at the conference. Tr. 1835-1841. On cross-examination, however, Rice conceded that he was mistaken and that the video was not shown to the equity analysts at the conference. Tr. 2512-2527, 2597-2609.

3569-3573, 3608-3611, 3732-3744, 3853-3865; see Pet. App. 51a-52a. In particular, Rice, who testified as a co-operating witness, stated that many of the representations about the EIN and the network control software layer were false. Tr. 1397-1398, 1416-1417, 1423-1430, 1582-1583, 1622-1623, 1670-1671, 1757-1759, 1923-1924, 2116-2118. Rice testified that EBS never fully developed the network control software. Tr. 1759, 1764, 1830.

Rice also testified that the purpose of the false statements at the conference was to increase the market valuation of Enron stock. Tr. 1399-1401, 1562-1570, 1582-1583. On the day of the conference, the share price of Enron stock rose from $54 to $67. Tr. 6389, 6395. The next day, the share price rose to $72. Tr. 6395. That same day, petitioner sold 100,000 shares of Enron stock. Tr. 6704-6705; Gov't Exh. 3155B. Over the next seven months, petitioner sold an additional 600,000 shares, generating total proceeds of more than $54 million and a total profit of more than $19 million. Gov't Exh. 3155B.

Petitioner testified on his own behalf, presenting several defenses. Tr. 9907-10,080, 10,121-10,249, 10,260-10,384, 10,396-10,453. He denied personally making any false statements about the development of the EIN at the conference or in the press releases. Tr. 9910-9914, 9918, 10,055-10,056. He also denied entering into an agreement with his co-defendants to defraud investors. Tr. 9920-9921. Petitioner denied having any role in the preparation of the press releases, and he claimed that his participation in planning the conference presentation was limited to the creation of two videos that were not shown. Tr. 9910-9911, 9913-9917, 9920, 9929-9944. In particular, petitioner denied having any role in preparing the presentation on the network control software

layer. Tr. 9941-9947, 9952-9953. In addition, petitioner claimed that he honestly believed in good faith that the problems with the EIN did not exist or were being remedied. Tr. 9920-9925, 9977-9980, 10,013-10,015, 10,021-10,022, 10,051-10,053. Petitioner denied that he used any insider information about problems at EBS when he sold Enron stock. Tr. 10,175-10,180; see Pet. App. 55a-56a.

c. On the securities fraud count, the district court instructed the jury that the government was required to prove beyond a reasonable doubt that, "in connection with the purchase or sale of Enron Stock, [petitioner] did any one or more of the following: (1) employed a device, scheme, or artifice to defraud as charged in the Indictment; or (2) made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading as charged in the Indictment; or (3) engaged in an act, practice, or course of conduct that operated, or would operate, as a fraud and deceit on any person as charged in the Indictment." J.A. 104-105. The court explained that "[a] 'device, scheme, or artifice to defraud[,]' as used in these instructions, * * * means the forming of some contrivance, plan, or design to trick or to deceive in order to obtain money or something of value." J.A. 106. The court emphasized that the jury could not find petitioner guilty unless the government proved that he "participated in the scheme or fraudulent conduct" or that he "caused [a false] statement to be made or [a material] fact to be omitted." J.A. 107; see J.A. 111 (instructing the jury that, "if you find that [petitioner] was not a knowing participant in the scheme[,] * * * you should acquit").

The court instructed the jury that the government was also required to prove beyond a reasonable doubt, as the second element, that petitioner "acted willfully, knowingly, and with the intent to defraud." J.A. 105. The court explained that "good faith on the part of a defendant is a complete defense to a charge of securities fraud, because such an honest or 'good faith' belief is inconsistent with a fraudulent intent." J.A. 109.

Finally, the court instructed the jury that the government was also required to prove beyond a reasonable doubt, as the third element, that petitioner "used, or caused to be used, any means or instrumentality of interstate commerce or of the mails." J.A. 105.[3]

The district court instructed the jury that the instructions on the securities fraud count applied to the insider trading counts as well. J.A. 125. In addition, on the insider trading counts, the court instructed the jury

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[3] On the wire fraud charges, the court instructed the jury that the government was required to prove four elements beyond a reasonable doubt: (1) that petitioner "knowingly devised or intended to devise a scheme to defraud, as described in the indictment"; (2) that he "acted with a specific intent to defraud"; (3) that he "used or caused another person to use interstate wire communications facilities for the purpose of carrying out the scheme"; and (4) that "the scheme to defraud employed false material representations." J.A. 116. On the conspiracy charge, the court instructed the jury that the government was required to prove beyond a reasonable doubt that (1) "[petitioner] and at least one other person made an agreement to commit the crime of wire fraud or securities fraud"; (2) "[petitioner] knew the unlawful purpose of the agreement and joined in it willfully"; and (3) "one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in Count One of the Indictment, in order to accomplish some object or purpose of the conspiracy." J.A. 90. The court stressed that, if the jury found that petitioner "was not a member of the conspiracy to commit securities fraud or wire fraud as charged in the indictment, then [it] must find [petitioner] not guilty." J.A. 92.

that "[t]he 'device, scheme, or artifice' that the government alleges [petitioner] employed in this case is known as insider trading." *Ibid.* The court explained that "[a]n insider is one who comes into possession of material, confidential, non-public information about a stock by virtue of a business relationship which involves trust and confidence" and that "the law forbids him from using that inside information in buying or selling the securities in question." *Ibid.*

d. The jury acquitted petitioner on the conspiracy, securities fraud, and wire fraud counts. J.A. 161-162. The jury was unable to reach a verdict on the insider trading and money laundering counts. J.A. 162-187. The district court therefore declared a mistrial on those counts. Pet. App. 4a.

2. Petitioner was subsequently charged in the eighth superseding indictment with some, but not all, of the counts from the fifth superseding indictment on which the jury had deadlocked. Specifically, the eighth superseding indictment charged petitioner with five counts of insider trading and eight counts of money laundering. J.A. 188-200. Like the insider trading counts in the earlier indictment, J.A. 31, the insider trading counts in the eighth superseding indictment allege that petitioner sold Enron stock "while in possession of material, non-public information regarding the technological capabilities, value, revenue and business performance" of EBS and Enron. J.A. 195. The money laundering counts in the eighth superseding indictments are based on monetary transfers involving funds derived from the sales of Enron stock charged as insider trading. J.A. 196-197; see note 1, *supra*. Unlike the earlier indictment, J.A. 9-13, the eighth superseding indictment does not allege that petitioner participated in a scheme to defraud, and

the government would not have to establish such participation in order to secure a conviction.

3. Petitioner moved to dismiss all of the counts in the eighth superseding indictment (as well as the mistried counts in the fifth superseding indictment). Pet. App. 4a-5a & n.4. He contended that the collateral estoppel component of the Double Jeopardy Clause bars prosecution on the insider trading counts because the government could obtain a conviction on those counts only by proving that he used material, non-public information in his sales of Enron stock, and the jury at the first trial necessarily found that he did not possess such insider information when it acquitted him on the conspiracy, securities fraud, and wire fraud counts. *Id.* at 39a-40a, 49a-50a. Petitioner further argued that, if the insider trading counts are barred, the money laundering counts also must be dismissed, because they are predicated on the alleged insider trading violations. *Id.* at 40a.

The district court denied petitioner's motion. Pet. App. 29a-66a. The court found that the acquittals at the initial trial did not collaterally estop the government from retrying petitioner on the counts on which the jury hung. "In light of (1) the massive amount of circumstantial evidence presented by the government, and (2) the direct testimony of [petitioner] that he did not participate in the crafting of the message at the 2000 Analyst Conference, drafting of press releases, or agreement to defraud investors," the court concluded that "the jury[,] by choosing [petitioner's] version of events, necessarily determined that [he] did not knowingly and willfully participate in the scheme to defraud described in the

conspiracy, securities fraud, and wire fraud counts." *Id.* at 57a-58a.[4]

That determination, the court observed, did not "negate the government's evidence and contention that [petitioner] possessed and used material nonpublic information at the time he made trades of Enron stock." Pet. App. 59a. Instead, it "only establish[ed] that [petitioner] did not participate in the overall scheme to defraud," *i.e.*, the false and misleading statements allegedly made at the 2000 analyst conference and in the press releases. *Ibid.* Because the government was not required to prove petitioner's participation in the scheme to defraud in order to convict him on the insider trading counts, the court ruled that the acquittals did not collaterally estop the government from retrying petitioner on the insider trading and money laundering counts charged in the eighth superseding indictment. *Id.* at 58a-59a, 62a.

4. The court of appeals affirmed the district court's judgment. Pet. App. 1a-28a. Without addressing the government's argument that *Richardson* v. *United States*, 468 U.S. 317 (1984), permitted the retrial of the mistried counts despite the acquittals on the other counts, the court of appeals held that petitioner had not

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[4] The district court concluded that the jury's acquittals were not based on petitioner's "good faith" defense, which "operate[d] as a valid and complete defense to both securities fraud and insider trading" under the court's jury instructions. Pet. App. 58a. The court observed that, "[i]f the jury necessarily acquitted [petitioner] [on the securities fraud count] based on the 'good faith' defense, they would have had to acquit [petitioner] of insider trading as well." *Id.* at 59a. "Because the jury did not acquit [petitioner] of both securities fraud and insider trading, but instead chose only to acquit [petitioner] of conspiracy, securities fraud, and wire fraud," the court found that "the most realistic, rational and practical analysis of the verdicts is that the jury did not acquit [petitioner] based on the defense of 'good faith.'" *Ibid.*

made the showing necessary to invoke collateral estoppel. Pet. App. 18a-28a. In analyzing petitioner's collateral estoppel claim, the court focused on the jury's acquittal on the securities fraud count. See *id.* at 18a-22a & n.20. The court concluded that, even though the acquittal, when viewed in isolation, appeared to reflect a jury finding that petitioner did not possess insider information, collateral estoppel analysis also requires consideration of the hung counts. *Id.* at 18a-23a. Taking into account those counts, the court held that petitioner had not met his burden of showing that the jury necessarily decided that he did not have insider information. *Id.* at 23a-28a.

Based on its review of the record, the court of appeals first concluded that the jury must have decided, in acquitting petitioner on the securities fraud count, that the government did not prove either the first element of the offense—*i.e.*, that petitioner participated in making material misrepresentations or omissions—or the second element—*i.e.*, that petitioner acted willfully, knowingly, and with the intent to defraud. Pet. App. 19a. The court next determined that the jury could have acquitted petitioner based on the first element only by finding that no misrepresentations or omissions were made at the 2000 analyst conference, and not by finding that petitioner did not participate in the scheme to defraud. *Id.* at 19a-20a. In reaching that determination, the court reasoned that petitioner had not disputed the government's claims at trial that he shaped the message of the EBS presentation at the conference. *Id.* at 20a.

The court further determined that the jury could have acquitted petitioner based on the second element only by finding, consistent with petitioner's "good faith" defense, that he did not knowingly make material mis-

representations or omissions, and not by finding that he acted negligently. Pet. App. 20a. In reaching that determination, the court again relied on its belief that petitioner had not disputed that he helped plan the conference message. *Ibid.*

The court then reasoned that, whether the jury acquitted (1) based on a finding that no material misrepresentations or omissions were made at the conference or (2) based on a finding that petitioner acted in good faith, "the jury must have found * * * that [petitioner] himself did not have any insider information." Pet. App. 21a. The court therefore concluded that, if the acquittals are viewed in isolation, the jury "seemingly made a finding that precludes the Government from now prosecuting [petitioner] on insider trading and money laundering." *Ibid.*[5]

The court ruled, however, that its precedent required it to consider the hung counts, along with the acquitted counts, in ascertaining what the jury actually determined. Pet. App. 22a-23a (citing *United States* v. *Larkin*, 605 F.2d 1360, 1370 (5th Cir. 1979), modified on other grounds, 611 F.2d 585 (5th Cir.), cert. denied, 446 U.S. 939 (1980)). Conducting that analysis, the court observed that, "if [petitioner] is correct that the jury found that he did not have insider information, then the jury, acting rationally, would have acquitted him of insider trading and money laundering." *Id.* at 23a-24a. The fact that the jury instead hung, the court concluded,

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[5] Because the court agreed with petitioner that the jury's acquittal on the securities fraud count, viewed in isolation, was based on a finding that he did not possess insider information, the court found it "unnecessary * * * to determine whether the jury made the same conclusion when it acquitted [petitioner]" on the conspiracy and wire fraud counts. Pet. App. 22a n.20.

presented a "potential inconsistency." *Id.* at 22a. The court considered various possible explanations for the "discrepancy," including that "the jury was irrational and came to two inconsistent conclusions" and that "the jury decided that [petitioner] had insider information when considering both" the acquitted counts and the hung counts, "but, for some unknown reason, it nonetheless acquitted [petitioner] on some of them." *Id.* at 24a. Because it was "impossible" to determine why the jury reached the mixed verdict, the court concluded that petitioner had not carried his burden of establishing that the jury necessarily decided that he did not possess insider information. *Id.* at 23a-24a. The court therefore held that collateral estoppel does not bar a retrial on the hung counts. *Id.* at 24a.

In concluding, the court explained that it had not accepted the government's argument, based on *United States* v. *Powell*, 469 U.S. 57 (1984), that collateral estoppel never bars a retrial when a jury hangs on some counts but acquits on others. Pet. App. 25a. The court expressed agreement with those courts of appeals that have rejected that argument. *Id.* at 26a-27a. The court stated, however, that it parted ways with those circuits to the extent that "they ignored the mistried counts after they determined that *Powell* does not apply." *Id.* at 27a. Accordingly, the court affirmed the district court's denial of petitioner's motion to dismiss. *Id.* at 28a.

SUMMARY OF ARGUMENT

The jury's acquittals at petitioner's first trial do not collaterally estop the government from retrying him on other counts on which the same jury hung.

A. The Double Jeopardy Clause provides that no person shall be "subject for the same offence to be twice

put in jeopardy of life of limb." U.S. Const. Amend. V. Although the text and common-law origins of the Clause suggest that it prohibits successive prosecutions only for the same offense, this Court has held that it also embodies collateral estoppel, which prohibits a successive prosecution on a related offense if an acquittal in the initial prosecution necessarily decided a factual issue in the defendant's favor that the government must prove to convict him on the related offense. *Ashe* v. *Swenson*, 397 U.S. 436, 443-445 (1970). At the same time, this Court has consistently recognized that the Double Jeopardy Clause does not guarantee a defendant that a prosecution will be completed in a single trial. Instead, the Clause affords the government "one full and fair opportunity" to obtain a conviction of those who have violated the law. *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978).

B. The jury's failure to agree on a verdict has long been recognized as the classic example of when the Double Jeopardy Clause permits retrial. See *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). Because "retrial following a 'hung jury' does not violate the Double Jeopardy Clause," *Richardson* v. *United States*, 468 U.S. 317, 324 (1984), the collateral estoppel component of the Clause does not bar retrial on hung counts when the jury acquits on other counts. Retrial on the hung counts is an integral part of the government's "one complete opportunity to convict," *ibid.* (citation omitted); that is, it represents a continuation of the initial prosecution that produced both the hung counts and the acquittals. It is not a successive prosecution that raises the concerns underlying the Double Jeopardy Clause and its collateral estoppel component.

This Court has never applied collateral estoppel across counts to bar retrial on charges for which the defendant remains in jeopardy. All of the Court's cases applying the doctrine have involved seriatim prosecutions. "[W]here the State has made no effort to prosecute the charges seriatim," this Court has rejected application of collateral estoppel, reasoning that "continuing prosecution on the remaining charges" does not implicate "the principles of finality and prevention of prosecutorial overreaching" that animate the double jeopardy protection. *Ohio* v. *Johnson*, 467 U.S. 493, 500 n.9, 501 (1984).

C. A jury's acquittal on one count cannot estop the government from retrying the defendant on another count on which the same jury hung for an independent reason. That kind of mixed verdict has only two possible explanations, and neither possibility supports applying collateral estoppel. The acquittal may rest on a jury finding that the government failed to prove a fact that, although essential for conviction on the count on which the jury acquitted, was not essential for conviction on the count on which the jury deadlocked. Collateral estoppel does not apply in that situation, because an acquittal on one charge collaterally estops the government from prosecuting another charge only if the jury, in finding the defendant not guilty, necessarily decided some fact that the government must prove beyond a reasonable doubt in order to convict on the second charge. See *Ashe*, 397 U.S. at 443-445. Alternatively, the acquittal may rest on a jury finding that the government failed to prove a fact that was essential for conviction on both the acquitted count and the hung count. Collateral estoppel does not apply in that circumstance, because the jury's failure to acquit on the hung count is inconsistent with

the jury's acquittal on the other count. That inconsistency vitiates "the assumption that the jury acted rationally," which is a necessary predicate for applying collateral estoppel. *United States* v. *Powell*, 469 U.S. 57, 68 (1984).

Petitioner argues (Br. 26) that a mixed verdict of acquittals and hung counts is not facially inconsistent like the mixed verdict of acquittals and convictions in *Powell*. But if a single finding of fact would dictate acquittal on two counts, and the jury acquits on one and hangs on the other, the jury has not acted consistently or rationally. Collateral estoppel cannot be applied in that situation without giving effect to an irrational decision. Petitioner also argues (Br. 15, 34-44) that, because hung counts are not formal jury decisions, they cannot be considered at all in the collateral estoppel analysis. But that contention cannot be squared with this Court's command in *Ashe* that the analysis consider "all the circumstances" of the prior proceedings. 397 U.S. at 444 (citation omitted).

D. Petitioner argues (Br. 16-23) that he should not be subjected to the costs and anxiety of a second trial. But a defendant must endure those costs and anxiety whenever the government retries charges following a hung jury. Acquittals on other counts should not deprive the government of its one complete opportunity to obtain a conviction on the hung counts. Nor will allowing retrial on the hung counts, where the jury could not agree, undermine "the traditional deference accorded jury acquittals." *Id.* at 16; see *id.* at 23-27. The acquittal still bars reprosecution on the same offense, and its collateral estoppel effect can be asserted in subsequent prosecutions. Nor will allowing retrial on hung counts in the circumstances here encourage overcharging. Cf.

id. at 27-34. Prosecutors already have substantial incentives not to overcharge in order to avoid jury confusion and the potential for mistrial on all counts. And, if such policy concerns have any weight in answering the constitutional question, the controlling policy should be the public's interest in having one full and fair opportunity for a conviction on the hung counts.

E. Even if acquittals may sometimes preclude retrial on counts on which the same jury hangs, this Court should affirm the judgment of the court of appeals. As the district court found, the jury's acquittals on the conspiracy, securities fraud, and wire fraud charges may have rested on a finding that petitioner did not participate in the fraudulent statements or omissions made at the 2000 analyst conference and in the press releases following the conference. The government need not prove that petitioner participated in those frauds to convict him on the insider trading and money laundering charges. Accordingly, petitioner cannot carry his burden of showing that the jury, in acquitting him on the conspiracy and fraud charges, necessarily found a fact in his favor that the government must prove to convict him on the charges on which it seeks to retry him.

ARGUMENT

THE JURY'S ACQUITTALS AT PETITIONER'S FIRST TRIAL DO NOT PRECLUDE HIS RETRIAL ON THE COUNTS ON WHICH THE SAME JURY HUNG

The collateral estoppel component of the Double Jeopardy Clause cannot preclude retrials where the jury rendered a mixed verdict of acquittals and hung counts. That is so for two basic reasons. First, permitting preclusion would conflict with the established rule that when a jury hangs, the government may retry the case

in order to have a complete opportunity for a verdict on a charged offense. Second, a mixed outcome presupposes either that the jury's two results (acquittals and hung counts) are consistent—in which case the factual predicate for collateral estoppel is missing—or that the two results are inconsistent and irrational—in which case the logical predicate for collateral estoppel is missing. In any event, even if acquittals could sometimes preclude retrials on counts on which the same jury hung, petitioner has not established that preclusion is warranted here. He has not shown that the jury, in acquitting him on the conspiracy and fraud charges, necessarily found a fact in his favor that the government must prove in order to convict him on the insider trading and money laundering counts on which it seeks to retry him.

A. The Double Jeopardy Clause Affords The Government One Complete Opportunity To Convict Those Who Have Violated The Law

1. The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The Clause protects a defendant against "a second prosecution for the same offense" after acquittal or conviction and against multiple punishments for the same offense. *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969).

The Double Jeopardy Clause "affords the defendant who obtains a judgment of acquittal * * * absolute immunity from further prosecution for the same offense." *Lockhart* v. *Nelson*, 488 U.S. 33, 39 (1988); see *United States* v. *Ball*, 163 U.S. 662, 671 (1896); see also *United States* v. *Scott*, 437 U.S. 82, 91 (1978) (government cannot appeal an acquittal); *United States* v. *Mar-*

tin Linen Supply Co., 430 U.S. 564, 571 (1977) (same). An acquittal is accorded "special weight" for two reasons. *United States* v. *DiFrancesco*, 449 U.S. 117, 129 (1980). "The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'" *Arizona* v. *Washington*, 434 U.S. 497, 503 (1978) (quoting *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962) (per curiam)). In addition, permitting retrials after acquittals would present an unacceptable "risk that the Government, with its vastly superior resources, might wear down the defendant," *Scott*, 437 U.S. at 91, through "repeated attempts to convict," *Green* v. *United States*, 355 U.S. 184, 187 (1957).

2. In *Ashe* v. *Swenson*, 397 U.S. 436, 445 (1970), this Court held that the principle of collateral estoppel is also "embodied" in the Double Jeopardy Clause. As the Court explained, collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. The burden is "on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling* v. *United States*, 493 U.S. 342, 350 (1990); see *Schiro* v. *Farley*, 510 U.S. 222, 232-233 (1994).

Ashe's holding that the Double Jeopardy Clause embodies collateral estoppel was an innovation. The Clause by its terms applies only to multiple jeopardy "for the same offence." U.S. Const. Amend. V. Collateral estoppel, by definition, applies only when two offenses are different, but share a common issue. See *United States* v. *Dixon*, 509 U.S. 688, 704-705 (1993). In addition, as a

matter of history, the Double Jeopardy Clause was intended to embody the common-law pleas of autrefois acquit and autrefois convict, which likewise were offense-specific. See *Scott*, 437 U.S. at 87; *United States* v. *Wilson*, 420 U.S. 332, 340-342 (1975); 4 William Blackstone, *Commentaries* *330; Edward Coke, *The Third Part of the Institutes of the Laws of England; Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* *213. As the Court acknowledged in *Ashe*, the Court had never before held that collateral estoppel is constitutionally mandated in criminal cases. 397 U.S. at 445 n.10. Indeed, collateral estoppel first developed in civil litigation, and the Court did not apply the doctrine to bar a federal criminal prosecution until 1916, in *United States* v. *Oppenheimer*, 242 U.S. 85.[6] See *Ashe*, 397 U.S. at 443.

Nonetheless, in *Ashe*, the Court concluded that collateral estoppel is a necessary component of the Double Jeopardy Clause's protection against successive prosecutions. The Court explained that, "whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time." *Ashe*, 397 U.S. at 445-446 (citations omitted). The Court noted that the increasing

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[6] In fact, *Oppenheimer* actually involved claim preclusion, rather than issue preclusion, which is the modern term for collateral estoppel. See *Taylor* v. *Sturgell*, 128 S. Ct. 2161, 2171 & n.5 (2008). In *Oppenheimer*, an indictment was dismissed as barred by the statute of limitations; the government later reindicted the defendant after a decision of this Court revealed that the limitations ruling was wrong. 242 U.S. at 86. The Court applied the doctrine of res judicata to affirm the dismissal of the second indictment. *Id.* at 87. The Court later applied common-law issue preclusion, or collateral estoppel, to bar a substantive charge after acquittal on a conspiracy charge in *Sealfon* v. *United States*, 332 U.S. 575 (1948).

number of overlapping statutory offenses has created potential for unfair, seriatim prosecutions for related offenses. *Id.* at 445 n.10. The Court viewed collateral estoppel as a necessary safeguard against such successive prosecutions. *Ibid.* Otherwise, the Court stated, the government could use a trial for one offense "as no more than a dry run for [a] second prosecution" for another crime that turns on the same ultimate facts. *Id.* at 447.

3. Despite rules against successive prosecutions, this Court has consistently recognized that the Double Jeopardy Clause "does not offer a guarantee to the defendant that the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding." *Oregon* v. *Kennedy*, 456 U.S. 667, 672 (1982). "There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of the law to protect society from those guilty of crimes would be frustrated by denying courts power to put the defendant to trial again." *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949).

Accordingly, this Court has repeatedly held that the Double Jeopardy Clause does not stand in the way of "affording the prosecutor one full and fair opportunity" to obtain a conviction of those who have violated the law. *Washington*, 434 U.S. at 505. The Court has therefore recognized numerous situations in which retrial is appropriately viewed as a continuation of the initial prosecution rather than a prohibited successive prosecution. Those situations include retrial after a mistrial justified by "manifest necessity," such as the jury's inability to reach a verdict, or trial error that cannot otherwise be corrected, *United States* v. *Perez*, 22 U.S. (9 Wheat.)

579, 580 (1824); *Illinois* v. *Somerville*, 410 U.S. 458, 464 (1973); retrial after a mistrial granted on the defendant's motion (unless the government intended to provoke the mistrial request), *Kennedy*, 456 U.S. at 678-679; and retrial after the defendant has obtained reversal of his conviction because of trial error, *Ball*, 163 U.S. at 671-672, because his guilty plea was involuntary, *United States* v. *Tateo*, 377 U.S. 463, 463-464 (1964), or because the conviction was against the weight of the evidence, *Tibbs* v. *Florida*, 457 U.S. 31, 47 (1982).

In those situations, the "criminal proceedings against [the] accused have not run their full course." *Price* v. *Georgia*, 398 U.S. 323, 326 (1970). He remains in "continuing jeopardy" from the initial prosecution and is subject to retrial without offending the Double Jeopardy Clause. *Ibid.*; see *Richardson* v. *United States*, 468 U.S. 317, 325-326 (1984); *Justices of the Boston Mun. Court* v. *Lydon*, 466 U.S. 294, 308-309 (1984).

B. Because A Defendant Remains In Continuing Jeopardy On Hung Counts, The Collateral Estoppel Component Of The Double Jeopardy Clause Does Not Bar Retrial On Those Counts When The Jury Acquits On Other Counts

This Court has long held that the failure of the jury to agree on a verdict is "[t]he classic example" of a situation in which the Double Jeopardy Clause permits a retrial. *Downum* v. *United States*, 372 U.S. 734, 736 (1963); see, *e.g.*, *United States* v. *Sanford*, 429 U.S. 14, 16 (1976) (per curiam); *Keerl* v. *Montana*, 213 U.S. 135, 137-138 (1909); *Dreyer* v. *Illinois*, 187 U.S. 71, 86 (1902); *Logan* v. *United States*, 144 U.S. 263, 297-298 (1892); *Perez*, *supra*. Because "retrial following a 'hung jury' does not violate the Double Jeopardy Clause," *Richardson*, 468 U.S. at 324, the collateral estoppel component

of the Clause does not bar retrial on a hung count when the jury acquits on another count.

1. In *Richardson*, the jury acquitted the defendant on one count but was unable to reach a verdict on two other counts. 468 U.S. at 318-319. After the district court declared a mistrial on those counts, the defendant moved to bar a retrial, arguing that a second trial would violate the Double Jeopardy Clause because the government had not presented sufficient evidence at the first trial to convict on the hung counts. *Id.* at 318. This Court rejected the defendant's double jeopardy claim. *Id.* at 322-326. The Court explained that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy," *id.* at 325, but "a mistrial following a hung jury is not an event that terminates the original jeopardy," *id.* at 326. Noting "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws," *id.* at 324 (citation omitted), the Court explained that "[t]he Government, like the defendant, is entitled to resolution of the case by verdict from the jury," *id.* at 326.

Richardson makes clear that retrial on hung counts under the circumstances here does not implicate the concern about successive prosecutions that underlies the collateral estoppel component of the Double Jeopardy Clause. As *Richardson* establishes, when the government brings a group of related counts together in one prosecution, and the jury hangs on some counts but acquits on others, the defendant's "original jeopardy" on the hung counts does not terminate. 468 U.S. at 326. Retrial on the hung counts is a continuation of the initial proceeding that produced both the hung counts and the acquittals. It is an integral part of the government's

"one complete opportunity to convict," not a successive prosecution designed to harass or to oppress the defendant. *Id.* at 324 (citation omitted).

This Court has never applied collateral estoppel across counts to bar retrial on charges for which the defendant remains in jeopardy. Instead, all of the Court's cases applying collateral estoppel have involved seriatim prosecutions. See *Turner* v. *Arkansas*, 407 U.S. 366 (1972) (per curiam); *Harris* v. *Washington*, 404 U.S. 55 (1971) (per curiam); *Simpson* v. *Florida*, 403 U.S. 384 (1971) (per curiam); *Ashe*, *supra*; *Sealfon* v. *United States*, 332 U.S. 575 (1948); *United States* v. *Adams*, 281 U.S. 202 (1930); *Oppenheimer*, *supra*. *Ashe* is a typical example. In *Ashe*, a group of masked men robbed six men playing poker in a home. 397 U.S. at 437. The defendant was initially prosecuted for robbing one of the poker players, but the jury acquitted him. The State then brought to trial a second prosecution against the defendant for robbing a different poker player. *Id.* at 438-440. Reversing the defendant's conviction, this Court held that collateral estoppel barred the second prosecution because the jury's acquittal in the first prosecution must have rested on a finding that the defendant was not one of the robbers. *Id.* at 445-446. *Ashe* thus involved a deliberate strategy by the State to prosecute sequentially multiple offenses arising out of a single criminal episode in order to evaluate and strengthen its evidence, spread its risk among several juries, or wear down the defendant. The Court concluded that such successive prosecutions involve the kind of government oppression that the Double Jeopardy Clause forbids. *Id.* at 447.

In contrast, "where the State has made no effort to prosecute the charges seriatim," this Court has rejected

application of collateral estoppel. *Ohio* v. *Johnson*, 467 U.S. 493, 500 n.9 (1984). The Court has explained that, in that circumstance, "the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Ibid.* In *Johnson*, the Court rejected the defendant's claim that his guilty pleas on two of the charges brought against him collaterally estopped the State from trying him on two other charges brought in the same prosecution. *Ibid.* The Court noted that "continuing prosecution on the remaining charges" did not implicate "the principles of finality and prevention of prosecutorial overreaching" underlying the double jeopardy prohibition. *Id.* at 501. "On the other hand," the Court stressed, "ending [the] prosecution" in midstream "would deny the State its right to one full and fair opportunity to convict" the defendant on the remaining charges. *Id.* at 502.

The same considerations counsel against applying collateral estoppel to bar retrial on hung counts based on the jury's acquittal on other counts brought in the same prosecution. Retrial on the hung counts does not intrude on finality, because it merely completes the original prosecution. Retrial on the hung counts also presents "none of the governmental overreaching that double jeopardy is supposed to prevent." *Johnson*, 467 U.S. at 502. The government attempted to bring all the charges in a single proceeding, but it was forced to retry some of the charges because the jury hung. The government is therefore not trying to "wear down the defendant," *Scott*, 437 U.S. at 91, through "repeated attempts to convict," *Green*, 355 U.S. at 187.

Precluding retrial on the hung counts would deprive the government of "its right to one full and fair opportunity to convict" the defendant on those counts. *Johnson*,

467 U.S. at 502. Respect for that governmental interest is the principal reason for the longstanding rule permitting retrial on charges on which a jury deadlocks. See *Washington*, 434 U.S. at 509. Applying collateral estoppel across counts in mixed verdict cases to bar retrial on hung counts would therefore undermine "the public's interest in fair trials designed to end in just judgments." *Kennedy*, 456 U.S. at 672 (quoting *Wade*, 336 U.S. at 689). And it would inappropriately allow the defendant to transform his partial victory in the jury room into a complete victory that the jury refused to give him.

The public interest in allowing retrial on hung counts is particularly strong in the mixed verdict context because the government has no ability to challenge the acquittals. See *Green*, 355 U.S. at 188 ("[O]ne of the elemental principles of our criminal law" is "that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous."). In the civil context, collateral estoppel does not apply at all when the party that would be precluded had no legal right to obtain review of the judgment. Restatement (Second) of Judgments § 28(1) (1982). Although the government's inability to appeal from an acquittal does not prevent the application of collateral estoppel in the criminal context, it counsels strongly against allowing a jury's acquittal to bar retrial on a hung count when the jury itself refused to acquit on that very count.

2. Petitioner contends that relying on *Richardson* to permit retrial on hung counts in a mixed verdict would "conflate[] traditional double jeopardy and the related doctrine of collateral estoppel" and "overrule *Ashe*." Br. 43-44. That contention is incorrect.

Collateral estoppel will continue to have effect independent of traditional double jeopardy principles even

if the Court holds that *Richardson*'s continuing jeopardy principle precludes applying collateral estoppel here. Whenever the government actually pursues seriatim prosecutions, the *Richardson* principle will not prevent collateral estoppel from barring a successive prosecution that requires proof of a fact necessarily decided against the government in a prior prosecution. Collateral estoppel will preclude the successive prosecution even if it is for a different offense and is therefore not barred under traditional double jeopardy analysis. See, *e.g.*, *Sealfon*, *supra*.

Petitioner's attempt to wholly divorce collateral estoppel from the surrounding and independently valid double jeopardy principles—such as the longstanding rule permitting retrials of hung counts—cannot be squared with this Court's holding in *Ashe* that collateral estoppel is not a freestanding constitutional guarantee but is "embodied" in the Double Jeopardy Clause itself. *Ashe*, 397 U.S. at 445. *Ashe*'s holding that the Double Jeopardy Clause embodies collateral estoppel is settled law, even if it is difficult to reconcile *Ashe* with the text and common-law origins of the Clause. See pp. 20-21, *supra*. But it is one thing to leave *Ashe* intact and quite another to allow collateral estoppel to overcome other established double jeopardy doctrines that afford the government a complete opportunity to convict those who have violated the laws. *Ashe* should therefore not be permitted to displace the *Richardson* rule. Indeed, under *Richardson*, the rule permitting retrials of hung counts prevails even where the jury *should* have acquitted because of insufficient evidence. A defendant should not be better off when the government introduces sufficient evidence to convict on all counts, but the jury for

reasons of its own acquits on some but cannot agree on others.

C. The Rationale Behind Collateral Estoppel Does Not Apply When A Jury Acquits On Some Counts And Hangs On Other Counts At The Same Trial

1. Even if collateral estoppel could apply in the absence of a successive prosecution, a jury's acquittal on one count would not estop the government from retrying the defendant on another count on which the same jury hung. That kind of mixed verdict has only two explanations, neither of which permits the application of collateral estoppel.

The acquittal may rest on a jury finding that the government failed to prove a fact that, although essential for conviction on the count on which the jury acquitted, was not essential for conviction on the count on which the jury deadlocked. For example, in this case, the district court concluded that "the most realistic, rational and practical analysis of the verdicts" is that the acquittals on the conspiracy and fraud counts rested on the jury's conclusion that the government did not prove that petitioner participated in the fraudulent statements made at the analyst conference and in the press releases—a fact that the government need not prove to convict him on the insider trading and money laundering counts on which the jury hung. Pet. App. 59a. Collateral estoppel is not applicable in that situation, because an acquittal on one charge collaterally estops the government from prosecuting another charge only if the jury, in finding the defendant not guilty, necessarily decided some fact that the government must prove beyond a reasonable doubt in order to convict on the sec-

ond charge. See *Dowling*, 493 U.S. at 347-348, 350-352; *Ashe*, 397 U.S. at 443-445.

Alternatively, the acquittal may rest on a jury finding that the government failed to prove a fact that was essential for conviction not only on the acquitted count but also on the hung count. For example, in this case, the court of appeals concluded that the acquittal on the securities fraud count "seemingly" rested on the jury's conclusion that the government did not prove that petitioner possessed insider information—a fact that the government also had to prove to convict him on the hung counts. Pet. App. 21a. Collateral estoppel would not apply in that circumstance, however, because the jury's failure to acquit on the hung counts would be inconsistent with the jury's acquittal on the other count. A rational jury that found the common fact against the government would have to acquit on both sets of counts. That inconsistency vitiates "the assumption that the jury acted rationally," which is a necessary predicate for application of collateral estoppel. *United States* v. *Powell*, 469 U.S. 57, 68 (1984).

2. The conclusion that a jury's acquittal on one count cannot collaterally estop the government from retrying a count on which the same jury deadlocks follows directly from *Powell*. In *Powell*, the jury acquitted the defendant on two drug charges but found her guilty on charges that she used a telephone to commit or to facilitate those drug offenses. 469 U.S. at 59-60. The defendant argued that "collateral estoppel should apply * * * to preclude acceptance of a guilty verdict on a telephone facilitation count where the jury acquits the defendant of the predicate felony." *Id.* at 64. This Court rejected that argument.

The Court explained that the inconsistent verdicts "should not necessarily be interpreted as a windfall to the Government at the defendant's expense" because it is "equally possible" that the acquittal was the result of "mistake, compromise, or lenity." *Powell*, 469 U.S. at 65. When the jury returns an acquittal on one count that is inconsistent with a guilty verdict on another count, the Court observed, it is impossible to tell which verdict "the jury 'really meant.'" *Id.* at 68. "[A]ll we know is that the verdicts are inconsistent," and, "once that is established[,] principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful." *Ibid.*

The same reasoning applies when a jury's acquittals on some counts are inconsistent with its failure to reach a verdict on other counts. In that situation as well, it is impossible to impute rationality to the jury. All a court can conclude is that the jury acted inconsistently and irrationally. Accordingly, the logical predicate for applying collateral estoppel is missing.

3. *Powell*'s conclusion that a rational jury decision is a necessary predicate for applying collateral estoppel follows from *Ashe*. In *Ashe*, the Court stated that, to determine whether collateral estoppel applies, a court must "examine the record of [the] prior proceeding," taking into account all "relevant matter," and "conclude whether a *rational* jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." 397 U.S. at 444 (citation omitted; emphasis added). Focusing the inquiry on what a rational jury could have done only makes sense if it is reasonable to presume that the jury in fact acted rationally.

A rule that collateral estoppel does not apply when the prior verdict reflects inconsistent determinations is also supported by this Court's decision in *Standefer* v. *United States*, 447 U.S. 10 (1980). In *Standefer*, the Court held that non-mutual collateral estoppel does not apply against the government in criminal cases. *Id.* at 21-25. In reaching that conclusion, the Court noted that the particular jury verdict for which the defendant was seeking preclusive effect included convictions on some counts that were inconsistent with acquittals on other counts. *Id.* at 23 n.17. The Court stated that "[t]his inconsistency [was] reason, in itself, for not giving preclusive effect to the acquittals." *Ibid.*

As *Standefer* makes clear, collateral estoppel "is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct." 447 U.S. at 23 n.18; see Restatement (Second) of Judgments § 29 cmt. f (1982). "Where a determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue, that confidence is generally unwarranted." *Ibid.* (explaining rationale for rule that non-mutual collateral estoppel does not apply when the judgment that would be given preclusive effect is inconsistent with another prior judgment).

Indeed, in civil cases, courts may decline to apply collateral estoppel where it is "evident from the jury's verdict that the verdict was the result of compromise," rather than a rational decision that accords with the jury instructions and the law. Restatement (Second) of Judgments § 28 cmt. j (1982); see 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4420, at 523-525 (2d ed. 2002). When the record indicates that the same jury reached inconsistent determinations on an issue, a court cannot conclude that the issue "was 'necessarily

determined' against the Government, as is required to support a later holding of collateral estoppel." *Harary* v. *Blumenthal*, 555 F.2d 1113, 1116 (2d Cir. 1977). That reasoning precludes application of collateral estoppel under the Double Jeopardy Clause when a jury inconsistently acquits on some counts and hangs on others. Applying collateral estoppel in that circumstance would require the "oddly surrealistic and irrational" conclusion that "the jury necessarily decided that which it confessed it could not decide." *United States* v. *Romeo*, 114 F.3d 141, 145 (9th Cir. 1997) (O'Scannlain, J. dissenting).

4. Petitioner argues that the reasoning in *Powell* and *Standefer* does not foreclose application of collateral estoppel to bar a retrial here "because a mixed verdict of acquittals and hung counts does not create the same inconsistency as a mixed verdict of acquittals and convictions." Br. 26. But a verdict of acquittals and hung counts creates an equally powerful inference of irrationality if it is assumed that the jury's acquittals rejected a fact that the government also had to prove on the hung counts. And collateral estoppel applies only if that assumption is true.

This case illustrates the point. A rational jury would not have returned the mixed verdict if it found a fact in petitioner's favor that was essential to conviction on both the acquitted counts and the hung counts. Petitioner claims (Br. 45-51) that collateral estoppel bars a retrial on the insider trading and money laundering counts on which the jury hung because the government must prove that he possessed insider information to obtain a conviction on those counts and the jury, in acquitting him on the conspiracy and fraud counts, necessarily determined that he did not possess insider information. But, if the jury in fact acquitted on the conspiracy and

fraud counts because it determined that petitioner did not possess insider information, and that determination also requires acquittal on the insider trading and money laundering counts, then a rational jury should have acquitted on those counts as well. Because the jury did not acquit on those counts, if petitioner's theory of the verdict is correct, the jury must have acted inconsistently and irrationally. Thus, as in *Powell* and *Standefer*, principles of collateral estoppel are "no longer useful," and the acquittals cannot be given preclusive effect. *Powell*, 469 U.S. at 68; see *Standefer*, 447 U.S. at 23 n.17.

Petitioner and his amici (Pet. Br. 15, 34-44; NACDL Br. 10-11; Crim. Law Professors Br. 17-21) try to avoid that conclusion by arguing that courts have "attributed no meaning" to hung counts (Pet. Br. 38) so they should not be considered in the collateral estoppel analysis. That argument is mistaken. In asserting that a hung count is a meaningless "non-event" (NACDL Br. 10), petitioner and his amici rely on cases like *Richardson*. See Pet. Br. 42-43; NACDL Br. 10. But *Richardson* does not suggest that hung counts *never* have *any* significance. *Richardson* held that "the failure of the jury to reach a verdict is not an event which terminates jeopardy" and therefore "retrial following a 'hung jury' does not violate the Double Jeopardy Clause." 468 U.S. at 324-325. As discussed above, that holding supports retrial on the hung counts in this case.

The contention that hung counts should not be considered in collateral estoppel analysis is also at odds with *Ashe*. *Ashe* emphasized that, to determine whether a defendant's prosecution is barred by the collateral estoppel component of the Double Jeopardy Clause, a court must "examine the record of [the] prior proceed-

ing, taking into account the pleadings, evidence, charge and other relevant matter." 397 US. at 444 (citation omitted). The Court stressed that "[t]he inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Ibid.* (quoting *Sealfon*, 332 U.S. at 579). The jury's failure to reach a verdict on certain counts is certainly "relevant matter" in the record of the prior proceeding. Refusal to consider that information would flout this Court's plain command that the collateral estoppel inquiry consider "all the circumstances" of that proceeding.

Petitioner and his amici also err in arguing (Pet. Br. 26-27, 34; NACDL Br. 12-13.; Crim. Law Professors Br. 17-19) that, unless hung counts are ignored entirely in the collateral estoppel analysis, courts will be required to examine the hung counts in each case in an effort to determine why the jury failed to reach a verdict. The court of appeals did engage in that kind of analysis in this case. Pet. App. 24a-28a. But the court did so only because it rejected the government's argument that collateral estoppel *never* bars retrial on a hung count based on an acquittal by the same jury on another count. See *id.* at 25a.[7] If this Court accepts that argument (see pp. 23-33, *supra*), courts will not have to attempt to deter-

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[7] Instead, the court concluded that, in each individual case, the hung counts must be considered along with the acquittals in an attempt to ascertain what facts, if any, the jury necessarily found in the defendant's favor. The government agrees with petitioner and his amici (Pet. Br. 44-45; NACDL Br. 3, 11; TCDL Br. 7) that the court of appeals' approach will in practice produce the same result as a categorical rule that collateral estoppel never applies. For that reason, and because the categorical approach is dictated by logic and precedent, this Court should not adopt the court of appeals' case-by-case approach.

mine the actual reasons why the jury hung in any particular case.

D. Petitioner's Policy Arguments Cannot Justify Extension Of Collateral Estoppel Principles To Bar Retrial Of Hung Counts

1. Petitioner argues (Br. 16-23) that allowing retrial on the hung counts would unfairly subject him to the costs and anxiety of a second trial and permit the government to hone its case after it failed to obtain a conviction on those counts in the first trial. That argument ignores this Court's repeated holdings that the prohibition on double jeopardy "does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment." *Wade*, 336 U.S. at 688. On the contrary, "a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Id.* at 689.

A hung jury has long been considered "the classic basis for a proper mistrial" that "require[s] the defendant to submit to a second trial." *Washington*, 434 U.S. at 509. Whenever a defendant faces a retrial after a hung jury, he must endure the costs and anxiety of a second trial and the risk that the government may learn from mistakes it made in the first trial. But that is an unavoidable cost of honoring "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Ibid.* This is not a case like *Ashe* in which the government held back related counts so that it could try them later if the first trial ended in an acquittal. Instead, it is a case in which the government seeks one full and fair opportunity to

convict on charges that it brought in a single prosecution.[8]

2. Petitioner and his amici also contend (Pet. Br. 16, 23-27; NACDL Br. 9-14; Crim. Law Professors Br. 21-25) that allowing retrial on the hung counts in this case would undermine "the traditional deference accorded jury acquittals." Pet. Br. 16. That contention is incorrect.

Allowing retrial on hung counts when the jury simultaneously acquits on other counts would not infringe the longstanding principle that a verdict of acquittal provides "absolute immunity from further prosecution for the same offense," *Nelson*, 488 U.S. at 39, and "may not be appealed," *Scott*, 437 U.S. at 91. The government thus cannot retry the acquitted conspiracy and fraud counts, even if it could proceed on a different legal theory or new factual proof.

Allowing retrial on the hung counts in the circumstances here also would not inappropriately curtail the collateral estoppel effect of acquittals. Collateral estoppel would continue to apply if the government sought to bring seriatim prosecutions and an acquittal in the initial prosecution necessarily determined an issue of fact in the defendant's favor that the government must prove to obtain a conviction in the subsequent prosecution.

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[8] Petitioner contends (Br. 22) that the government improperly "tailor[ed]" the charges in the eighth superseding indictment "to avoid making the same mistakes with a second jury" that it purportedly made in the first trial. The eighth superseding indictment, however, merely omitted certain factual allegations from the prior indictment to reflect the jury's acquittals on the conspiracy, securities fraud, and wire fraud counts and reduced the number of insider trading and money laundering counts. The government's decision to omit extraneous allegations and to abandon certain counts that it could have legally retried does not offend double jeopardy principles.

Even an acquittal that was accompanied by hung counts could have collateral estoppel effect in a successive prosecution involving new counts that were not brought in the initial prosecution. For example, if the jury, in acquitting petitioner on the wire fraud charges at his first trial, necessarily found that he did not participate in preparing the press releases issued by Enron or EBS, those acquittals would collaterally estop the government from bringing a new prosecution charging petitioner with mail fraud based on those press releases.

3. Petitioner and his amici also argue (Pet. Br. 27-33; NACDL Br. 14-21; Crim. Law Professors Br. 28-30) that allowing retrial on hung counts in these circumstances will encourage prosecutorial overcharging. They assert that prosecutors will take advantage of the numerous overlapping offenses in modern criminal codes "to charge as many overlapping counts as possible, thereby paving the way for a retrial[,]" in order to "evad[e] the collateral estoppel consequences of * * * an acquittal." NACDL Br. 14.

Those contentions ignore the substantial risks faced by a prosecutor who "charge[s] as many overlapping counts as possible." A prosecutor who loads down his case with unnecessary charges makes the case more difficult for the jury to comprehend and increases the likelihood that the jury will acquit the defendant "through mistake, compromise, or lenity." *Powell*, 469 U.S. at 65. Indeed, prosecutorial overcharging tempts the jury to use its unreviewable power to acquit "as a check against arbitrary or oppressive exercises of power by the Executive Branch." *Ibid.*; see *Standefer*, 447 U.S. at 22. Prosecutors are unlikely to add charges that may increase the likelihood of acquittals on some counts

in order to "evad[e] the collateral estoppel consequences of * * * an acquittal" on those counts.

Petitioner and his amici also ignore the substantial risks to the government that overcharging could produce jury confusion and a mistrial on all counts. As this Court has noted, "[i]t is possible that new evidence or advance understanding of the defendant's trial strategy will make the State's case even stronger during a second trial," but "[i]t is also possible * * * that the passage of time and the experience of defense counsel will weaken the prosecutor's presentation." *Tibbs*, 457 U.S. at 43 n.19; see *United States* v. *Loud Hawk*, 474 U.S. 302, 315 (1986) ("The passage of time may make it difficult or impossible for the Government to carry [its] burden [of proving its case beyond a reasonable doubt]."); *Engle* v. *Isaac*, 456 U.S. 107, 127-128 (1982) ("Passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible.").

In part because of these practical concerns, federal prosecutors are instructed to "bring as few charges as are necessary to ensure that justice is done." *United States Attorneys' Manual* § 9-27.320(B) (Jan. 2007). Those instructions reflect the government's recognition that overcharging undermines "the fair and efficient administration of justice." *Ibid.* Given the obvious costs to the government of bringing unnecessary charges, and the clear guidance discouraging that conduct, allowing retrials on hung counts in the mixed verdict context is unlikely to result in the strategic overcharging suggested by petitioner and his amici.

Petitioner (Br. 28) and amicus NACDL (Br. 17 n.2) contend that the government overcharged the offenses against petitioner, but that claim is misguided. The fifth superseding indictment broke down the counts into four

logically distinct units. The indictment charged (1) one count of conspiracy based on securities and wire fraud; (2) one count of substantive securities fraud based on the false statements in the analyst conference; (3) three counts of wire fraud based on false press releases; and (4) remaining counts growing out of petitioner's alleged insider trading, in which he used undisclosed material information to sell Enron stock, and his alleged money laundering by investing the proceeds in other financial holdings. See Pet. App. 30a-31a. The number of the insider trading and money laundering counts was large only because the number of allegedly fraudulent and money laundering transactions in which petitioner engaged was vast. But the conduct underlying the insider trading and money laundering counts all turned on a common core of factual proof: that petitioner used his knowledge of the problems with EBS when he sold Enron stock without disclosing his knowledge to investors. See *id.* at 50a n.28. No dispute existed that petitioner engaged in the charged transactions; rather, the central issue for the jury was whether petitioner used nonpublic material information in trading. The number of counts did not affect the jury's ability to decide that issue; indeed, the jury hung on all of insider trading and money laundering counts, suggesting that it viewed them of a piece. Accordingly, petitioner's speculation (Br. 28) that the jury returned a mixed verdict of acquittals and hung counts because of exhaustion or confusion in wading through numerous counts lacks foundation. The far more likely explanation is that it could not agree whether he acted in good-faith, Pet. App. 55a-56a (describing petitioner's "good faith" defense), or whether he used insider information in making his trades, *id.* at 56a (describing petitioner's "defense that he did not '*use*'

material, nonpublic information, based on testimony that the trades were made by [petitioner] or his wife, in the course of normal investing and for purposes of diversification").

Not only is the purported policy justification for expanding collateral estoppel (*viz.*, to deter overcharging) a questionable basis for expanding one double jeopardy doctrine at the expense of other settled double jeopardy doctrines, but the expansion is at odds with other important double jeopardy policies. The government's right to one complete opportunity to secure a conviction for a violation of the laws, which is the foundation for the rule permitting the retrial of hung counts, does not exist for its own sake. Rather, that right serves the public's profound interest in ensuring that criminal violations are adjudicated in court. When a grand jury has found probable cause to believe that the criminal laws were violated, the public is entitled to seek a jury verdict that resolves that matter. Concern about prosecutorial overcharging, which is likely to be a self-defeating practice in any event, should not thwart that important public interest.

E. Petitioner Has Not Established That The Jury's Acquittals Necessarily Determined A Fact In His Favor That The Government Must Prove To Convict Him On The Hung Counts

Even if the Court agrees with petitioner that acquittals can preclude retrials on counts on which the same jury hangs (and that hung counts cannot be considered at all in the collateral estoppel analysis), the Court should affirm the judgment of the court of appeals. Petitioner has not carried his burden of showing that the jury, in acquitting him on the conspiracy and securities

and wire fraud charges, necessarily found a fact in his favor that the government must prove to convict him on the insider trading and money laundering charges on which it seeks to retry him.

Petitioner contends (Br. 45-51) that a retrial is barred because the acquittals, viewed in isolation, necessarily determined that he did not possess insider information—an element that the government must prove beyond a reasonable doubt to convict him on the insider trading and money laundering charges. Petitioner primarily relies (Br. 45-46) on the court of appeals' conclusion that, if the acquittal on the securities fraud count is considered without giving any weight to the hung counts, "the jury must have found that * * * [petitioner] himself did not have any insider information." Pet. App. 21a. The court of appeals' conclusion on that point is, however, incorrect.[9] Rather, the district court's contrary conclusion, based on its far greater familiarity with the nature of the charges, the evidence at trial, and the parties' positions, shows why petitioner did not carry his burden in this case.

The court of appeals reached its conclusion based on two subsidiary determinations, both of which rested on the same flawed premise—that petitioner did not dispute that he shaped the message at the 2000 analyst conference. First, the court determined that "the jury

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[9] Indeed, later in its opinion, the court appeared to retreat from that conclusion. When considering possible explanations for the apparent inconsistency between the acquittal on the securities fraud count and the failure to reach a verdict on the insider trading and money laundering counts, the court observed that it was possible "that the jury decided that [petitioner] had insider information when considering both sets of counts, but, for some unknown reason, it nonetheless acquitted [him] on some of them." Pet. App. 24a.

could not have acquitted [petitioner] by finding that, while there were representations or omissions made, [petitioner] did not participate in making them." Pet. App. 19a-20a. The court rested that determination on its belief that petitioner "did not dispute" the government's argument "at trial that [petitioner] helped shape the message of the conference presentations." *Id.* at 20a. Second, the court determined that "the jury could not have acquitted [petitioner] for negligently making material misrepresentations or omissions." *Ibid.* That determination also rested on the court's mistaken belief that "it was undisputed that [petitioner], as Senior Vice President of Strategic Development, helped plan the conference message." *Ibid.*

In fact, as the district court found, petitioner hotly disputed that he had any involvement in shaping the conference presentations. Pet. App. 55a-57a; see p. 6, *supra*; see, *e.g.*, Tr. 9938-9941 (petitioner denying any role in deciding which slides were shown at the conference); Tr. 9941-9947 (petitioner denying any role in preparing the presentation on the network control software layer); Tr. 9953 (petitioner denying attendance at the "run-through" the day before the conference); Tr. 9932-9933 (petitioner testifying that the videos for which he was responsible were not shown at the conference).[10]

As the district court observed, "the defense * * * argued that [petitioner] did not participate in the craft-

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[10] Petitioner also vigorously denied that he had any participation in the press releases that formed the basis for the wire fraud counts. Pet. App. 55a; see, *e.g.*, Tr. 9911, 9913, 13,384. And the district court found that "the government introduced no evidence that [petitioner] played any role in the formation of the press releases." Pet. App. 55a. As for the conspiracy charge, petitioner denied that he entered into any agreement with anyone to commit a crime. *Ibid.*; see, *e.g.*, Tr. 9920.

ing of the statements in the press releases; did not participate in the creation of the slides or statements presented at the analysts conference; and did not reach an agreement with any other person to make false, misleading, or deceptive statements or material omissions of fact." Pet. App. 55a. Thus, as the district court concluded, the jury may well have acquitted petitioner on the conspiracy, securities, and wire fraud charges based on a finding that petitioner had no role in making false statements or material omissions at the analyst conference or in the press releases and that he had not conspired with anyone to commit fraud. *Id.* at 59a. In light of that possible explanation for the acquittals, petitioner cannot carry his burden of showing that the jury *necessarily* determined that he did not possess insider information based on acceptance of his "good faith" defense. See *Dowling*, 493 U.S. at 352 (declining to apply collateral estoppel because "[t]here [were] any number of possible explanations for the jury's acquittal verdict").[11]

Contrary to petitioner's contentions (Br. 46, 48-49), the jury was not instructed that it could find him guilty on the conspiracy and fraud counts based solely on a finding that he "knew the 'truth' about EBS and failed to disclose it" when others made misstatements at the

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[11] Petitioner incorrectly suggests (Br. 45-46) that the district court concluded that the jury must have accepted his "good faith" defense. On the contrary, the district court ruled that the jury's acquittals were more likely based on a finding that petitioner did not knowingly and willfully *participate* in the scheme to defraud. Pet. App. 57a-59a. The district court concluded that the jury most likely did *not* accept petitioner's "good faith" defense. *Id.* at 58a-59a. Although the court considered the hung counts in reaching that conclusion, *id.* at 59a, the record clearly supports the possibility that the acquittals, even when viewed in isolation, may have been based on a finding that petitioner did not participate in the scheme to defraud.

analyst conference and in the press releases. Br. 48. The jury was instructed that, to find petitioner guilty on the conspiracy count, it had to find that he "made an agreement to commit the crime of wire fraud or securities fraud" with at least one other person. J.A. 90. The jury was specifically told that it had to acquit petitioner if he "was not a member of the conspiracy." J.A. 92. On the securities fraud count, the jury was instructed that it could find petitioner guilty only if he "participated in the scheme or fraudulent conduct" or personally "caused" material misstatements to be made or material facts to be omitted from statements that were made. J.A. 95. The jury was expressly told that it had to acquit petitioner if he "was not a knowing participant in the scheme." J.A. 111. And, on the wire fraud charges, the jury was instructed that it could find petitioner guilty only if he "knowingly devised or intended to devise a scheme to defraud" and he "either wired" the allegedly false press releases or "caused [them] to be wired in interstate commerce in an attempt to execute or carry out the scheme." J.A. 118. Thus, the jury was not required to find petitioner guilty on the conspiracy and fraud charges simply because it found that he possessed insider information and failed to disclose it. The acquittals on those counts therefore do not indicate that the jury necessarily determined that petitioner did not possess and fail to disclose insider information. See Pet. App. 58a.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 2009

REPLY BRIEF

122

(11)

FILED
MAR 13 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-67

In the
Supreme Court of the United States

F. SCOTT YEAGER,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTRODUCTION

For nearly a century, this Court has held that a jury's verdict of acquittal is "conclusive upon all that it decided." *United States v. Adams*, 281 U.S. 202, 205 (1930) (citing *United States v. Oppenheimer*, 242 U.S. 85 (1916)). Where a defendant can demonstrate that, in acquitting him, the jury necessarily decided an issue in his favor, the Double Jeopardy Clause bars his prosecution for any crime requiring resolution of that issue in the government's favor. *Ashe v. Swenson*, 397 U.S. 436 (1970).

Petitioner Scott Yeager, following a lengthy jury trial, was acquitted of multiple charges of conspiracy, securities fraud, and wire fraud. He has demonstrated that in acquitting him, the jury necessarily decided that he did not possess insider information about his company that contradicted what was told to the public. The government, however, asks this Court to ignore the collateral estoppel effect of Yeager's acquittals because the jury that acquitted him also deadlocked on counts that share the common element of possession of insider information.

This Court's precedent on collateral estoppel fully supports Yeager's position that he cannot be forced to stand trial on issues already decided in his favor. The government, in response, asks this Court to extend the holdings of *United States v. Powell*, 469 U.S. 57 (1984), and *Richardson v. United States*, 468 U.S. 317 (1984), in a way that would deprive criminal defendants of important constitutional protections against successive prosecutions. Neither case should be interpreted to prevent the application of collateral estoppel here.

The Court held in *Powell* that when a jury reaches inconsistent verdicts, all the verdicts must be allowed to stand. Here, however, all of the jury's verdicts were acquittals. The government reads *Powell* to mean that a hung count can be inconsistent with an acquittal, but the Court should not treat hung counts with the same deference reserved for a jury's *verdict*. The powerful protections that attach to an acquittal should not be outweighed by the inconclusiveness of a hung count. Unlike the expression of the community's will inherent in an acquittal, a hung count represents nothing more than an inability to reach a verdict. Given the secrecy of the jury's deliberative process, no meaning can be derived from a jury's failure to reach a verdict.

Richardson was not a collateral estoppel case, and the government's efforts to extend its narrow holding would blur the fundamental distinction between a claim and an issue because Yeager's case involves collateral estoppel, also known as issue preclusion, and not double jeopardy, which is akin to claim preclusion. Collateral estoppel prevents a reprosecution when double jeopardy does not otherwise apply, and it should apply here since forcing Yeager to "run the gantlet" twice offends the important policies that this Court has repeatedly relied upon in defining the protections of the Double Jeopardy Clause.

Finally, the Court should recognize, as the Fifth Circuit did, that the only realistic explanation for the jury's acquittals is its determination that Yeager did not possess insider information. The government's broad omissions theory provided the jury with multiple avenues of conviction, and when the jury acquitted Yeager it necessarily rejected the theory

that he possessed insider information but failed to disclose it to correct misstatements made by others. The jury's verdicts necessarily decided this critical issue in Yeager's favor, and the government should not be allowed to relitigate the same issue before a new jury at Yeager's peril.

ARGUMENT

I. Since There Is No Inconsistency Between The Acquittals And The Hung Counts, *United States v. Powell* Does Not Prevent The Application Of Collateral Estoppel Here.

A. The Hung Counts Should Not Be Considered In The Collateral Estoppel Analysis.

1. Despite this Court's consistent treatment of hung counts as lacking decisional significance, the government would nullify the collateral estoppel effect of the jury's acquittals by assuming they are inconsistent with the hung counts. To establish this claimed inconsistency, the government first speculates on why the jury was unable to reach a verdict—a task that is both futile and inappropriate—and then asks the Court to treat its speculation about why the jury hung with the deference that should apply only to verdicts.

This Court held in *Powell* that inconsistent *verdicts* of acquittal and conviction by the same jury must be allowed to stand. 469 U.S. at 64-67. In this case, unlike in *Powell*, the jury did not convict Yeager of anything—*its only verdicts were acquittals*. There is no inconsistency between those acquittals and the hung counts because hung counts

are not unanimous decisions of the jury entitled to the deference accorded to verdicts. Extending *Powell* to cases where the jury acquits on some counts and hangs on others would effectively treat the hung counts as if they were unanimous jury decisions inconsistent with the acquittals. The Court should reject this argument because of the obvious differences between unanimous verdicts and hung counts.

2. A hung jury is defined as a jury "so irreconcilably divided in opinion that they cannot agree upon any verdict by the required unanimity," Black's Law Dictionary 741 (6th ed. 1990), or as "one that did not carry out the task assigned it." Anne B. Poulin, Collateral Estoppel in Criminal Cases, 58 Cinn. L. Rev. 1, 44 n.12 (1989). Therefore, the "jury's failure to reach a verdict [is] too inconclusive to qualify as inconsistent" for the purposes of collateral estoppel. *Id.* Historically, a hung count, unlike an acquittal, was treated as a non-event. *See United States v. Perez*, 22 U.S. (9 Wheat.) 579, 579 (1824) ("[T]he jury, being unable to agree, were discharged by the Court from giving any verdict upon the indictment . . . ."); *Richardson*, 468 U.S. at 325 (rejecting the argument "that a hung jury is the equivalent of an acquittal"). The government summarily rejects the thorough historical analysis of hung counts by Yeager and his amici, dismissively asserting that "petitioner and his amici rely on cases like *Richardson*." Gov't Br. at 34. In fact, the historical analysis relies on precedent stretching back to pre-colonial times and addresses the treatment of hung counts at and before the time of the framing of the Constitution. *See* Pet. Br. at 35-39; Law Prof. Br. at 20, 26-27.

Since a hung count is not a unanimous decision

by the jury, it cannot affect or resolve any factual issues, either in favor of the government or in favor of the defendant. When it hangs, "the jury makes no decision at all." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 117 (2003) (O'Connor, J., concurring). An acquittal, on the other hand, "represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). And when a defendant demonstrates that an issue was necessarily decided by the jury, an acquittal forecloses that issue from future consideration. *Ashe*, 397 U.S. at 443; *see also Dowling v. United States*, 493 U.S. 342, 347-48 (1990). Treating hung counts as jury decisions inconsistent with unanimous acquittals or convictions would ignore this history and policy. *Powell* did not work a change in the historical treatment of hung counts as lacking significance, and the government's treatment of a hung count as the equivalent of a verdict would trivialize the acquittals.

3. Given the clear differences between an acquittal and a hung count, the government's interpretation of *Powell* must be rejected. In *Powell*, the Court was faced with clearly "inconsistent *verdicts*" that were erroneous, "in the sense that the jury [had] not followed the court's instructions." 469 U.S. at 65 (emphasis added). The Court applied the rule established in *Dunn v. United States*, 284 U.S. 390 (1932), that "a criminal defendant convicted by a jury on one count could not attack that conviction because it was inconsistent with the jury's verdict of acquittal on another count." *Powell*, 469 U.S. at 58. The Court recognized that the "rule that [a] defendant may not upset such a verdict" was prudent for a number of reasons, including that

"once the jury has heard the evidence and the case has been submitted, *the litigants must accept the jury's collective judgment.* Courts have always resisted inquiring into a jury's thought processes." *Id.* at 65, 67 (citing *McDonald v. Pless*, 238 U.S. 64 (1915); Fed. R. Evid. 606(b)) (emphasis added).

Here, it is the government, not Yeager, that is attempting to "upset" the jury's verdicts and inquire into why it deadlocked. Unable to point to a contradiction on the face of the jury's verdicts, but still unwilling to "accept the jury's collective judgment," *Powell*, 469 U.S. at 67, the government encourages this Court to speculate about the jury's thought processes, ignoring *Powell's* specific admonition against such speculation. *Id.* at 66.

B. The Hung Counts Are Not Inconsistent With The Acquittals.

1. The government asks the Court to assume that the jury acted irrationally. Gov't Br. at 31. It claims that, if the jury rejected an issue essential to the hung counts, it should have acquitted on the hung counts, and that not doing so was "irrational" or "inconsistent." This argument fails for three reasons.

First, under the government's technically restrictive test, which assumes that the jury may have acted irrationally in hanging on some counts, acquittals can never be said to settle questions of ultimate fact, and collateral estoppel would mean nothing at all. The Court recognized this in *Ashe*, when it said that "a restrictive definition of 'determined' amounts simply to a rejection of collateral estoppel . . . ." 397 U.S. at 444 n.9 (quoting Daniel K. Mayers & Fletcher L. Yarbrough, Bis

Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 38 (Nov. 1960)); *see also United States v. Romeo*, 114 F.3d 141, 144 (9th Cir. 1997) ("Because there are so many variable factors which can cause a jury not to reach a verdict," a court should not "speculate on why the jury could not agree."). Speculation about why the jury hung that allows for the possibility that the jury acted irrationally ends the *Ashe* collateral estoppel analysis before it begins, because *Ashe* asks "whether *a rational jury* could have grounded its *verdict* upon an issue other than that which the defendant seeks to foreclose from consideration." 397 U.S. at 444 (emphasis added).

The government's interpretation of *Powell* is based on the flawed premise that the jury took an irrational approach to its deliberations. The government assumes that the jury applied collateral estoppel itself, first resolving factual issues in one count, and then analyzing whether that resolution necessitated additional acquittals. Gov't Br. at 30. Because Yeager was not acquitted on the insider trading counts, the argument goes, the jury must not have determined any issue critical to those counts in his favor—because otherwise he would have been acquitted. *Id.* The government's theory should be rejected not only because it speculates about the jury's deliberations, but also because it is almost certainly wrong.

The jury was specifically instructed by the district court not to engage in the analysis that the government proposes. In its instructions, the court told the jury:

> Each count, and the evidence pertaining to it, should be considered separately. The case of

> each defendant should be considered separately and individually. The fact that you may find one or more of the accused not guilty or guilty of any of the crimes charged should not control your verdict as to any other crime or any other defendant.

J.A. 82-83. Since the jury is presumed to have followed its instructions, *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)), it would have gone from count to count, considering Yeager's guilt or innocence separately on each count. When the jury acquitted on the securities fraud count, it was instructed not to leap forward to analyze whether that acquittal resolved issues on the insider trading counts. And if the deliberations ended before the jury reached a verdict on each count, it is highly possible that the jury simply never considered the hung counts. While we can never know why the jury hung, it is incorrect that the jury must have determined an issue common to the acquittals and hung counts inconsistently or irrationally.

Second, the government demands the impossible when it insists that Yeager must explain the "rational" basis for the jury's failure to reach a verdict. *See, e.g.*, *United States v. Ohayon*, 483 F.3d 1281, 1289 (11th Cir. 2007) ("[T]he search for the basis of a mistried count will necessarily be in vain . . . because the mistried count is not a decision for which we can discern, or to which we can impute, a single, rational basis."). Due to the well-settled prohibition on inquiring into the jury's deliberations, no defendant could establish the reasons for a hung count. In fact, Yeager requested permission to interview the jurors following their verdict, and his

motion was denied by the district judge. *See* Pet. App. 67a. And even if Yeager had interviewed the jurors, he could not have used the information he learned to establish why they failed to reach verdicts. *See* Fed. R. Evid. 606(b).

Third, even assuming it is appropriate to consider the basis for the hung counts, the government ignores other possible explanations that do not compel the conclusion that the jury was irrational or that the hung counts were inconsistent with the acquittals. The jury may have been overwhelmed by the 176 counts against the five defendants and never reached the insider trading and money laundering counts against Yeager. Alternatively, after sitting through a thirteen-week trial, the jurors may have cut their deliberations short because they were exhausted by the hardships of their service. Another possibility is that the district court's unusual *Allen* charge, which essentially told the jurors they could go home at the end of the day if they did not reach verdicts on the hung counts, caused the jurors to stop their deliberations. *See* R-21536. It is also possible that, by the time it reached the insider trading counts, the jury deadlocked on an element that was not shared with the acquitted counts and abandoned deliberations without considering the common element of possession of insider information.

Consider the theory that the jury was exhausted and simply gave up in the middle of deliberations. Despite the government's contention that this theory "lacks foundation," Gov't Br. at 40, the record is clear that the jurors suffered considerable hardship throughout the trial. The district judge expressed her concerns on the record:

> The jury is going insane back there [due to the length of the witness examinations]. . . . They're back there having a fit. . . . A whole bunch of people are not being paid [by their employers], so another month out of work is like going to drive them—they're having fits back there. They said everybody but one person says they're not going to get paid. . . . I am just trying to tell y'all, you got a jury that's getting ready to go insane. They're not getting paid. . . . [E]verybody has got problems except for one person.

R-11034-035. Economic hardship led the court to consider dismissing two jurors, R-11237-238, and began to affect the jurors' ability to focus, according to the district judge, who said the jurors "aren't even paying attention anymore, they're in such dire financial straits." R-11401. One juror was eventually forced to borrow money to remain on the jury. R-11908. And when the jurors asked not to take off the Memorial Day holiday, their reason was clear to the court: "These jurors want this case over." R-11908. These repeated and extreme statements on the record reveal the very real possibility that the jurors cut their deliberations short out of exhaustion.

2. All of the scenarios offered by Yeager explain how the jury may have deadlocked without acting inconsistently or irrationally. But it is impossible to know which, if any, is the correct explanation, and for this very reason *Powell* prohibits an assessment of the jury's actions that is based on "pure speculation." 469 U.S. at 66.

For the same reason, the government is wrong that *Ashe's* holding that the collateral estoppel

inquiry should "be set in a practical frame and viewed with an eye to all the circumstances of the proceedings" means that the Court must divine a basis for the hung counts and consider them as part of its *Ashe* analysis. Gov't Br. at 35. The basis for hung counts can never be ascertained except in the rare case where the jurors are allowed to testify about their deliberations, and therefore the reasons why a jury hung cannot be considered part of the "record of [the] prior proceeding" that must be examined in the *Ashe* inquiry. *See* 397 U.S. at 444.

3. The Court should reject the government's reading of *Powell* because hung counts are not verdicts entitled to the same deference as acquittals. Here, weighing hung counts as findings contrary to the acquittals would not accord those acquittals the deference to which they are entitled. Instead, it would equate them in significance with the hung counts. *See Powell*, 469 U.S. at 67 ("[D]eference [to] the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality."); *see also Arizona v. Washington*, 434 U.S. 497, 503 (1978) ("The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'") (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)). The powerful double jeopardy protection that attaches to acquitted counts should not be nullified by the inconclusiveness inherent in hung counts.

II. The Government's Interpretation Of *Richardson* Is Inconsistent With This Court's Collateral Estoppel Precedent.

A. Collateral Estoppel Can Apply Even If Double Jeopardy Does Not.

1. The claim preclusive effects of double jeopardy are rooted in the common law pleas of *autrefois acquit*, *autrefois convict*, and pardon. *E.g., United States v. Scott*, 437 U.S. 82, 87 (1978). For either *autrefois acquit* or *autrefois convict* to apply, the defendant must already have been acquitted or convicted of the same offense now brought against him. There must have been "some event, such as an acquittal, which terminates the original jeopardy" before the claim preclusive effect of double jeopardy may bar a subsequent prosecution for that same offense. *Richardson*, 468 U.S. at 325 (citing *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 308-10 (1984); *Price v. Georgia*, 398 U.S. 323, 329, (1970)). This reference to a termination of jeopardy must be viewed in the context of the issues before the Court when *Richardson* was decided—the defendant only invoked the claim preclusive protections of double jeopardy and never argued that collateral estoppel barred his retrial.

The government places great weight on the language from *Richardson* quoted above, claiming that jeopardy must have "terminated" on the hung counts before collateral estoppel can bar them. Gov't Br. at 24. But the government is attempting to invoke a doctrine properly applied to cases of *claim preclusion* double jeopardy—where the same offense has already been adjudicated—whereas in this case the issue is collateral estoppel—the branch of the

double jeopardy doctrine that deals with issue preclusion. Yeager argues that the acquittals necessarily resolved an ultimate issue in his favor, thereby barring his retrial on the hung counts. He does not claim that the offenses he is now charged with have already been adjudicated.

2. In *Richardson*, the defendant "assume[d] that the judicial declaration of a mistrial [following a hung count] was an event which terminated jeopardy in his case and which allowed him to assert a valid claim of double jeopardy." 468 U.S. at 325. This assumption was incorrect because this Court's precedent stretching back to *Perez*, 22 U.S. (9 Wheat.) 579, rejected the argument that "a hung jury is the equivalent of an acquittal." *Richardson*, 468 U.S. at 325. Without a "termination" of the claim against Richardson, it was plainly impossible for him to assert the double jeopardy equivalent of *autrefois acquit*, because there was no prior acquittal to bar reprosecution on the same offense. Thus, *Richardson* affirmed that a hung count, in itself, does not prevent reprosecution on the same offense.

But determining whether collateral estoppel bars the hung counts in this case requires a different kind of analysis. Collateral estoppel involves the preclusion of issues, not claims. As this Court held in *Sealfon v. United States*, 332 U.S. 575, 578-79 (1948), when a defendant is charged with "separate and distinct offenses," collateral estoppel "operates to conclude those matters in issue which the verdict determined though the offenses be different." *See also Ashe*, 397 U.S. at 443 (collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated"); *Adams*, 281 U.S. at 205 ("[A]lthough not technically

a former acquittal, the judgment was conclusive upon all that it decided.").

As this Court first held in *Oppenheimer*, it is sometimes necessary to apply collateral estoppel when the claim preclusive effect of double jeopardy does not apply:

> The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice in order, when a man once has been acquitted on the merits, to enable the Government to prosecute him a second time.

242 U.S. at 88 (internal citations omitted).[1]

3. The government reads *Richardson* broadly to establish that, if "original jeopardy" has not terminated on the hung counts, they cannot be barred by collateral estoppel. Gov't Br. at 24. This assertion effectively requires Yeager to prove that he is entitled to a double jeopardy plea of *autrefois acquit* before collateral estoppel can apply here. Moreover, this reading of *Richardson* is inconsistent

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[1] Though *Oppenheimer* used the phrase "res judicata," it addressed collateral estoppel or issue preclusion. *See Ashe*, 397 U.S. at 464 (Burger, J., dissenting) ("The majority rests its holding in part on a series of cases beginning with *United States v. Oppenheimer* . . . which did not involve constitutional double jeopardy but applied collateral estoppel . . . ."); *see also Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008) ("The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'").

with the Court's precedent holding that collateral estoppel applies even when a prior acquittal has not occurred. In fact, there are numerous collateral estoppel decisions in this Court evaluating whether counts on which the defendant was not acquitted or convicted—and on which jeopardy had not terminated—should be barred. *See Ashe*, 397 U.S. at 444; *Sealfon*, 332 U.S. 575; *Adams*, 281 U.S. at 205; *Oppenheimer*, 242 U.S. 85; *see also* Gov't Br. at 25 (collecting cases).

The government's reading of *Richardson* would make it inconsistent with these cases. In *Ashe*, the defendant was acquitted of robbing one card player and then prosecuted for robbing another player at the same card game. 397 U.S. at 439-440. Jeopardy had not even *attached*, much less *terminated*, with respect to the new charge, but this Court nevertheless held that Ashe's prosecution on the new charge was barred by collateral estoppel. *Id.* at 446-447.

The courts of appeals have recognized the flaws in the government's argument, finding that its interpretation of *Richardson* "would eliminate collateral estoppel from criminal cases and overrule *Ashe*." *United States v. Shenberg*, 89 F.3d 1461, 1479 (11th Cir. 1996) (quoting *United States v. Bailin*, 977 F.2d 270, 275 (7th Cir. 1992)). Indeed, the government has acknowledged elsewhere "that the logical conclusion of its argument renders collateral estoppel superfluous." *Bailin*, 977 F.2d at 276 n.6 (citing government's reply brief). *Richardson* cannot fairly be read to eliminate criminal collateral estoppel, particularly when the doctrine was not even raised by the defendant in that case. Perhaps this is why the government's expansive reading of *Richardson* has been rejected in the appellate courts

and adopted nowhere. *See Wilson v. Czerniak*, 355 F.3d 1151, 1156 (9th Cir. 2004); *Shenberg*, 89 F.3d at 1479; *Bailin*, 977 F.2d at 275; *United States v. Benton*, 852 F.2d 1456, 1462 (6th Cir. 1988).

4. Jeopardy has terminated on the counts on which Yeager was acquitted, even if it has not on the hung counts. *See, e.g., Smith v. Massachusetts*, 543 U.S. 462, 469 n.3 (2005) ("[O]ur cases establish that jeopardy may terminate on some counts even as it continues on others."). Those acquittals are therefore entitled to deference, including the recognition that they were "conclusive upon all that [they] decided." *Adams*, 281 U.S. at 205. Whether jeopardy has terminated on the hung counts would only be relevant if Yeager were asserting, like Richardson, that the adjudication of those counts barred his further reprosecution. But Yeager asserts that the *acquittals* bar his reprosecution on the hung counts, and this distinguishes his case from Richardson's. Those acquittals are final. No court has the power to set them aside.

B. The Government Had A Full And Fair Opportunity To Prove That Yeager Possessed Insider Information.

Whenever collateral estoppel bars retrial of hung counts, the government will lose an opportunity to relitigate factual issues decided against it by the prior acquittal and to obtain a jury verdict on the hung counts. There is nothing unfair about this result, because the government was given one opportunity to convict on each count. Giving the government a fair opportunity to prosecute Yeager cannot require this Court to allow the government to retry an issue that has already been decided in

Yeager's favor, because *Ashe* held that the government cannot "constitutionally hale him before a new jury to litigate that issue again." 397 U.S. at 446. In *Ashe*, the government never received any opportunity to prosecute Ashe for the robbery of the second poker player because the prosecution was barred by collateral estoppel. *Id.* at 447.[2]

As this Court has held in multiple contexts, a defendant's Fifth Amendment rights may trump the government's interest in obtaining a verdict. For instance, when a district judge, in the middle of trial, directs the jury to return verdicts of acquittal that are "egregiously erroneous," that action is not appealable, and the government never gets an opportunity to present the acquitted charges to the jury. *See Fong Foo*, 369 U.S. at 143. Similarly, when a court grants a Rule 29(c) motion for judgment of acquittal following a hung jury, the government is not entitled to appeal that decision, and it has no opportunity to obtain a jury verdict. *Martin Linen Supply*, 430 U.S. at 575. And, as the Court held in *Smith*, when a district judge orders an acquittal midtrial, that acquittal cannot be overturned, even if the district judge later reverses her own order during the same trial. 543 U.S. at 468. The issue is not an abstract notion of fairness

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[2] The Restatement of Judgments does not support the government's position, because it deals only with "the effects of prior adjudications in civil litigation [and] does not deal with res judicata in criminal proceedings, that is, the effects of a prior criminal or civil judgment in a subsequent criminal prosecution." Restatement (Second) of Judgments 1 Scope (1982). That subject "includes not only concepts of claim and issue preclusion as applied to criminal litigation but also the closely related matter of double jeopardy, and is worthy of separate exposition." *Id.*

but rather the constitutionally mandated protection of the defendant's Fifth Amendment rights.

Thus, "subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause." *Id.* at 467 (quoting *Smalis v. Pennsylvania*, 476 U.S. 140, 145 (1986)). And this rule applies even where there is no prejudice to the defendant other than the retrial itself, because "[r]equiring someone to defend against a charge of which he has already been acquitted is prejudice *per se* for purposes of the Double Jeopardy Clause." *Id.* at 473 n.7. This unwillingness to overturn acquittals illustrates their "particular significance." *Scott*, 437 U.S. at 98. Indeed, this Court has called its refusal to review acquittals for error "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence." *Martin Linen Supply*, 430 U.S. at 571 (citing *United States v. Ball*, 163 U.S. 662, 671 (1896)).

Letting the government retry Yeager would unfairly ignore the first jury's acquittals and its resolution of the factual issues. The Court should not permit the government to relitigate that finding before a second jury, because "[t]he primary goal of barring reprosecution after acquittal is to prevent the State from mounting successive prosecutions and thereby wearing down the defendant." *Justices of Boston Municipal Court*, 466 U.S. at 307.

C. Application Of Criminal Collateral Estoppel Is Not Limited To Seriatim Prosecutions.

1. If the hung counts are not barred by collateral estoppel, Yeager will be subjected to all the hardships that the Double Jeopardy Clause protects

against, including "having to 'run the gantlet' a second time." *Ashe*, 397 U.S. at 445-46 (citing *Green v. United States*, 355 U.S. 184, 190 (1957)). The government's decision to charge Yeager with 127 felony counts in a single indictment, rather than splitting the charges into separate indictments, does not prevent the application of collateral estoppel here. Relying on dicta in *Ohio v. Johnson*, 467 U.S. 493, 500 n.9 (1984), the government claims that the Fifth Amendment does not protect Yeager against retrial on an issue already decided in his favor because the retrial would not be "seriatim." Gov't Br. at 16.

In *Johnson*, the defendant was charged with four crimes. He offered to plead guilty to the two lesser offenses and to plead not guilty to the two greater ones. This plea was accepted over the government's objection. After the trial court held that, under the Double Jeopardy Clause, the defendant's guilty pleas on the lesser offenses barred further prosecution on the more serious ones, this Court reversed, holding that the defendant "should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges." *Johnson*, 467 U.S. at 502. Of special importance here, the Court also found that Johnson's guilty plea did not decide any factual issues because "the taking of a guilty plea is not the same as an adjudication on the merits after full trial, such as took place in *Ashe v. Swenson*." *Id.* at 500 n.9. *Johnson* does not support the government's position here because the facts of Yeager's case are almost precisely opposite to the facts in *Johnson*. As the Court described Johnson's situation:

> No interest of respondent protected by the Double Jeopardy Clause is implicated by continuing prosecution on the remaining charges brought in the indictment. . . . Respondent has not been exposed to conviction on the charges to which he pleaded not guilty, nor has the State had the opportunity to marshal its evidence and resources more than once or to hone its presentation of its case through a trial. . . . There simply has been none of the governmental overreaching that double jeopardy is supposed to prevent.

Id. at 501-02.

In contrast, Yeager is not using collateral estoppel as a sword to prevent the government from having its one full opportunity to prosecute, but as a shield to prevent the government from having the opportunity to relitigate an issue that was already decided at his first trial. Yeager, unlike Johnson, has been exposed to conviction and has already been through a trial.

2. Moreover, the government has not only had an opportunity to hone its presentation of the evidence through a lengthy trial—it has done far more, using what it learned at the first trial to reformulate the charges against Yeager. After Yeager filed his initial collateral estoppel challenge to the hung counts, the government obtained an Eighth Superseding Indictment that separated Yeager from his codefendants and significantly altered the factual allegations against him. Pet. Br. at 11, 21-22. Rather than merely "omitting" allegations, as the government claims, Gov't Br. at 37, the Eighth Superseding Indictment added new language and a

new theory of prosecution. Pet. Br. at 11, 21-22. The government could have merely redacted the Fifth Superseding Indictment on which Yeager was previously tried by removing those counts on which he was acquitted. Instead, it presented a new indictment to a grand jury to find probable cause for new allegations against him.

The government's effort to refashion its case against Yeager based on what it learned at his first trial provides another good reason to apply collateral estoppel here. The Fifth Amendment "was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green*, 355 U.S. at 187. Even if the government believed when Yeager was first indicted that it could prove all 127 counts against him in a single trial, "the constitutional guarantee forbids" its attempt to "refine [its] presentation in light of the turn of events at the first trial." *Ashe*, 397 U.S. at 447.

3. Under the government's "seriatim" prosecution rule, so long as a prosecutor includes all charges in an initial indictment, he may prosecute those charges repeatedly until he receives a verdict on all of them, while ignoring any collateral estoppel that might arise from acquittals along the way. Gov't Br. at 26. At the same time, the government admits that collateral estoppel would bar a new charge that relies on an element already decided in Yeager's favor. *Id.* at 38.

This distinction between charges brought in one indictment and those brought in separate indictments would treat defendants differently depending on a prosecutor's decision to charge multiple counts, as in this case, or to proceed with multiple indictments, as was done in *Ashe*. But this

differential treatment cannot be squared with the rule that "[e]ach count in an indictment is regarded as if it was a separate indictment." *Dunn*, 284 U.S. at 393 (citing *Latham v. The Queen*, 5 B. & S. 635, 642, 643 (1864); *Selvester v. United States*, 170 U.S. 262 (1998)); *see also Selvester*, 170 U.S. at 267 ("Each count is, in fact and theory, a separate indictment . . . ."); *Powell*, 469 U.S. at 62 (citing *Dunn*, 284 U.S. at 393). Under the *Dunn* rule, collateral estoppel should apply in the same fashion to each count, whether the counts are brought in the same or sequential indictments. The *Green* concerns about a defendant being repeatedly subjected to trial are applicable whenever the government relitigates the same *issue* seriatim after it has been decided in the defendant's favor, whether the government uses one indictment or many.

4. In addition, the government's proposed rule would encourage prosecutors to overcharge defendants in sprawling indictments like the one that Yeager went to trial on, so that even if the jury acquits on some counts, the government can still relitigate any issues decided in the defendant's favor if the jury fails to reach a verdict on other related counts. The government responds that overcharging presents "substantial risks" to the government. Gov't Br. at 39. But in reality, overcharging is all too common, as illustrated by the 127 counts brought against Yeager. And despite the government's assertion that the U.S. Attorney's Manual provides "clear guidance" discouraging overcharging, Gov't Br. at 39, courts have consistently held that Department of Justice policies do not establish a standard to which defendants can hold the government. *See United States v. Lopez-Matias*, 522 F.3d 150, 155-156 (1st Cir. 2008) (collecting cases);

United States v. Wilson, 413 F.3d 382, 389 (3d Cir. 2005).

5. Finally, even when charges are grouped in one indictment, the facts of this case illustrate how the government, "with its vastly superior resources, might wear down the defendant, so that 'even though innocent he may be found guilty.'" *Scott*, 437 U.S. at 91 (quoting *Green*, 355 U.S. at 188). Yeager was charged with more counts than any top Enron official, including Chairman Kenneth Lay, CEO Jeffrey Skilling, and CFO Andrew Fastow. *See* Press Release, U.S. Dep't of Justice, Federal Jury Convicts Former Enron Chief Executives Ken Lay, Jeff Skilling on Fraud, Conspiracy and Related Charges (May 25, 2006), http://www.usdoj.gov/enron/pdf/layskillingverdictfinalpr.pdf; Press Release, U.S. Dep't of Justice, Former Enron Chief Financial Officer Andrew Fastow Pleads Guilty to Conspiracy to Commit Securities and Wire Fraud, Agrees to Cooperate With Enron Investigation (Jan. 14, 2004), http://www.fbi.gov/dojpressrel/pressrel04/enron011404.htm. He was charged with overlapping crimes, including wire fraud, securities fraud, insider trading, and 99 counts of money laundering. Like other defendants who have raised similar collateral estoppel issues in the appellate courts, Yeager "could be subject to numerous retrials simply because of the multiplicity of technically distinct (though factually overlapping) counts." *Bailin*, 977 F.2d at 277 (defendants charged with 195 counts of mail fraud, wire fraud, and Commodity Exchange Act violations); *United States v. Frazier*, 880 F.2d 878, 881 (6th Cir. 1989) (defendants charged with 52 counts); *see also Ashe*, 397 U.S. at 445 n.10 ("As the number of statutory offenses multiplied, the

potential for unfair and abusive reprosecutions became far more pronounced.").

Although the government did not secure a single conviction at Yeager's first trial, he remains in jeopardy nearly six years after the initial indictment was brought against him. While there is no question that his efforts to prevent the government from relitigating issues that have already been decided have consumed some of this time, the strain on Yeager from such extended proceedings is undeniable. The government cannot force him "to live in a continuing state of anxiety and insecurity." *Green*, 355 U.S. at 187.

III. The Jury Necessarily Decided That Yeager Did Not Possess Insider Information.

1. Yeager's acquittal on securities fraud necessarily decided that he did not possess and fail to disclose the "truth" about Enron when alleged misstatements were made at the January 20, 2000 conference for stock analysts ("the 2000 Analysts Conference"). The Fifth Circuit recognized that Yeager's acquittal on the securities fraud allegations of Count Two alone is enough to demonstrate that the jury necessarily decided that he did not possess insider information, because by acquitting Yeager the jury must have determined either that (1) there were no material misrepresentations or omissions made at the 2000 Analysts Conference or (2) that Yeager did not knowingly make misrepresentations or omissions at the 2000 Analysts Conference because he believed the presentations were truthful. Pet. App. 21a. While the government now tries to focus on events leading up to the 2000 Analysts Conference, Count Two only alleged conduct on the

day of the conference, charging that Yeager made "untrue statements of material facts *and omit[ted] to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.*" J.A. 25 (emphasis added).

Since the government's position at trial regarding Yeager's role at the 2000 Analysts Conference was that he "barely said a word," R-5716, the omissions allegation was critical to the case against him. The government crafted the Fifth Superseding Indictment to include a theory of criminal omissions in each of the counts on which the jury acquitted Yeager and in the insider trading counts on which the jury hung. In Count One, the government charged Yeager with conspiring "to make untrue statements of material facts *and omit to state facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.*" J.A. 20-21 (emphasis added).

On Count Two, in addition to the language from the indictment quoted above, the district court instructed the jury to consider whether Yeager committed criminal omissions. J.A. 104-09. Yeager could be convicted if he "*omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading as charged in the Indictment.*" J.A. 105 (emphasis added).

When charging the jury on Counts Three to Six, which alleged wire fraud, the district court also included omissions as a basis for liability: "A representation would also be 'false' when it constitutes a half-truth, or effectively omits or conceals a material fact, provided it is made with intent to defraud." J.A. 117.

The jury was thus instructed that it could convict Yeager if he either personally failed to correct false or misleading information on the day of the 2000 Analysts Conference or caused omissions in the presentations made that day. The government pressed this omissions theory during its lengthy cross-examination of Yeager. That line of questioning made clear that the government's theory was that Yeager committed criminal omissions during the 2000 Analysts Conference by failing to disclose insider information that was necessary to correct misstatements made at the conference:

> Q: At any time during the Analyst Conference, did you ever get up and say, "Well, some of this is inaccurate?"
>
> A: No.
>
> Q: Did you ever say, "Some of this isn't clear"?
>
> A: No.
>
> Q: Did you ever get up and say, "This isn't the entire story"?
>
> A: No. I thought at the level it was being given it was clear, and it was a high level.
>
> Q: My question was simply about your actions.
>
> A: I did not do that.

R-16987-88. Given this omissions theory, it does not matter whether Yeager disputed that he participated

in meetings before the 2000 Analysts Conference or not. Gov't Br. at 43. Even if Yeager made no false statements, caused no one to make false statements, and did not participate in the crafting of false statements or omissions in the presentations that were made at the Analysts Conference, the jury, under the district court's instructions, had to convict him on Count Two if it believed that he knew insider information—the "truth" about Enron Broadband Services ("EBS") that contradicted what was presented at the 2000 Analysts Conference—but failed to disclose it at the conference. As the government succinctly put it, Yeager could have been guilty of not "getting up" and saying something at the conference. R-16987-88.

Since Yeager was acquitted on Count Two, charging in part a failure to correct the allegedly false statements made at the 2000 Analysts Conference by others, the jury must have determined that when he said nothing at the conference, he did not possess and withhold insider information.

2. Like the Fifth Circuit, the district court erred by weighing the hung counts in the collateral estoppel analysis, instead of focusing only on the acquittals. The district court's consideration of the hung counts is clear from the record:

> If the jury necessarily acquitted Yeager based on the "good faith" defense, they would have had to acquit Yeager of insider trading as well. Because the jury did not acquit Defendant Yeager of both securities fraud and insider trading, but instead chose only to acquit Yeager of conspiracy, securities fraud, and wire fraud, the Court finds that the most

> realistic, rational and practical analysis of the verdicts is that the jury did not acquit Defendant Yeager based on the defense of "good faith."

Pet. App. 59a. Thus, although the government would have this Court follow the district court's reasoning, that analysis is similarly tainted by the court's consideration of the hung counts. Gov't Br. at 42.

3. The government proposes an alternative basis for the jury's multiple acquittals of Yeager, positing that the jury found that Yeager lacked the necessary intent to defraud or to knowingly conspire. *Id.* at 44-45. But what it fails to recognize is that Yeager's defense was that he held a good-faith belief that all was well at EBS. Pet. App. 20a. As the court of appeals recognized, that good-faith defense was the equivalent of a failure to possess insider information that the "truth" about EBS differed from public statements. *Id.* If the jury accepted Yeager's defense that he held a good-faith belief in EBS and its products and services, it must have found that he did not possess insider information that contradicted the statements made about EBS at the 2000 Analysts Conference. Yeager simply could not have knowingly possessed insider information that he did not believe was true.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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March 13, 2009

AMICUS CURIAE BRIEF

BGIO 12

No. 08-679

Supreme Court, U.S
FILED
JAN 2 1 2009
OFFICE OF THE CLERK

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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4APSCI

QUESTION PRESENTED

Whether, when a jury acquits a defendant on multiple counts but fails to reach a verdict on other counts that share a common element, and, after a complete review of the record, the court of appeals determines that the only rational basis for the acquittals is that an essential element of the hung counts was determined in the defendant's favor, collateral estoppel bars a retrial on the hung counts.

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BRIEF OF *AMICI CURIAE* CRIMINAL LAW PROFESSORS IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

This case concerns an issue of profound importance in the area of criminal law and procedure—the extent to which the government may bring successive prosecutions in derogation of the findings that underlie a prior jury verdict of "not guilty." The undersigned *amici* are professors of criminal law and criminal procedure and have a particular interest in the correct interpretation of the Constitution's safeguards for the accused, including the

protections of the Fifth Amendment's Double Jeopardy Clause. As scholars in the field, *amici* have a unique perspective on the rules, traditions, and practices in this area, as well as a strong interest in ensuring their consistent and proper application. A list of *amici* is set forth as an appendix to this brief. App., *infra*, 1a-2a.[1]

STATEMENT OF THE CASE

The jury in this case reached a verdict on many of the charges against petitioner, finding him "not guilty" on count after count. There is no dispute that, if this Court accepts that verdict as rational and treats the determinations underlying it as binding, the government would be precluded from prosecuting petitioner on the charges at issue here. The jury, in reaching a unanimous verdict of "not guilty" on various charges in the first trial, necessarily found that the government had failed to prove certain facts; those same facts are also essential elements of the offense the government seeks to prosecute in a second trial. The sole question in this case is whether the jury's unanimous verdict of "not guilty" somehow loses its preclusive effect—whether it no longer warrants full respect—because the jury also failed to reach a verdict (*i.e.*, it hung) on other charges that include the same essential element.

I. Factual Background

Petitioner F. Scott Yeager worked as an executive at Enron Broadband Services ("EBS"), the Enron Corporation's broadband and telecommunications unit. The

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[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or persons other than *amici* and their counsel made such a monetary contribution. Both parties have consented to the filing of this brief. The parties' letters so consenting have been filed with the Clerk's office.

United States indicted petitioner as well as other EBS senior executives, "alleg[ing] that [they] purposely sought to deceive the public by making false statements about EBS's progress and financial condition." Pet. App. 3a. The government alleged that they "made false claims in various press releases beginning in 1999 and at Enron's annual analyst conference in January 2000." *Id.* at 3a-4a. The indictment also averred that various defendants sold "millions of dollars of Enron stock while making these false statements." *Id.* at 4a.

Based on those allegations, the government charged petitioner with one count of conspiracy to commit securities fraud and wire fraud; one count of the substantive offense of securities fraud; four counts of the substantive offense of wire fraud in connection with press releases issued by EBS from January 31, 2000 through May 15, 2000; 20 counts of insider trading arising from his decisions to sell Enron stock that he owned; and 99 counts of money laundering. Pet. App. 3a & n.2.

II. Proceedings Below

A. Proceedings In The District Court

At trial, the government's theory was that petitioner and the other defendants "all participated in a single conspiracy aimed at falsely portraying the technological capabilities, value, revenue, and business performance of Enron Broadband Services." Pet. App. 50a-51a. According to the government, "the objective of the conspiracy was to increase the price of Enron stock, so that the Defendants could personally enrich themselves through stock sales, salary and performance bonuses." *Id.* at 51a. After an almost three-month trial, the jury acquitted petitioner of conspiracy to commit securities fraud and wire fraud, securities fraud, and all four wire-fraud counts. *Id.* at 31a. The jury hung, however, on the in-

sider-trading and money-laundering counts, "indicat[ing] that they were hopelessly deadlocked." *Ibid.*

The government then reindicted petitioner (in an Eighth Superseding Indictment) on insider-trading and money-laundering charges. Pet. App. 31a. Petitioner moved to dismiss, arguing that the jury's verdict of acquittal barred the government from trying him on the same set of operative facts. *Id.* at 34a-36a. The district court rejected that argument. The court observed "that 'collateral estoppel bars relitigation only of those facts necessarily determined in the first trial.'" *Id.* at 37a (quoting *United States* v. *Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997)). But it expressed concern that "the determination of what the jury necessarily decided can be an 'awkward' task, because 'a general verdict of acquittal does not specify the facts "necessarily decided" by the jury.'" *Id.* at 38a (quoting *Brackett*, 113 F.3d at 1399).

After analyzing the defense's theory at trial, the prosecution's theory, and the evidence, the district court found "that the jury necessarily determined that [petitioner] did not knowingly and wilfully participate or agree to participate in a scheme to defraud in connection with the alleged false statements or material omissions made at the analyst conference and press releases." Pet. App. 59a. The district court nonetheless rejected petitioner's claim because, in its view, the government could prevail on the charges in the Eighth Superseding Indictment even if one accepted such a finding as true. Petitioner's "acquittal on the conspiracy, securities fraud, and wire fraud counts of the Indictment," the court held, "does not completely bar the government from retrying [petitioner] on the charges of insider trading and money laundering." *Ibid.*

B. Proceedings In The Court Of Appeals

The Fifth Circuit affirmed. Pet. App. 1a-28a. Like the district court, the court of appeals recognized that "[t]he Fifth Amendment's guarantee against double jeopardy incorporates the collateral estoppel doctrine." *Id.* at 5a (citing *Ashe* v. *Swenson*, 397 U.S. 436, 443-444 (1970)). In determining "whether collateral estoppel bars a subsequent criminal prosecution," the Fifth Circuit stated, "courts must conduct a two-step analysis": First, they must "decide which facts necessarily were decided in the first proceeding"; then, they must "consider whether the facts necessarily decided in the first trial constitute essential elements of the offense in the second trial." *Id.* at 6a-7a (quoting *Bolden* v. *Warden*, 194 F.3d 579, 584 (5th Cir. 1999)).

The court of appeals concluded that the district court's determinations on the first step fell short. Analyzing the record and the law together, the Fifth Circuit concluded that petitioner "is correct that the jury, acting rationally, could have acquitted [him] on securities fraud *only by concluding that he did not have insider information.*" Pet. App. 18a (emphasis added). The court explained that "the jury could have acquitted [petitioner] of securities fraud for two reasons: (1) there were no material misrepresentations or omissions made at the conference; or (2) [petitioner] did not knowingly make misrepresentations or omissions because he believed the presentations were truthful." *Id.* at 21a. "Under either rationale," the court stated, "the jury must have found when it acquitted [petitioner] that [petitioner] himself did not have any insider information that contradicted what was presented to the public." *Ibid.*

The Fifth Circuit did not dispute that, if the determination that petitioner did not have insider information was taken as conclusive, the Double Jeopardy Clause would bar the government from retrying petitioner on

the insider-trading and money-laundering charges. Possession of material, non-public information is an element of insider trading. And the money-laundering charges were wholly derivative of the insider-trading counts. The finding that petitioner lacked material, non-public information, the Fifth Circuit thus conceded, "seemingly [represents] a finding that precludes the Government from now prosecuting him on insider trading and money laundering." Pet. App. 21a. "[C]onsider[ing] *the acquittals by themselves*, it appears that [petitioner] *is correct that collateral estoppel bars a retrial.*" *Id.* at 21a-22a (emphasis added).[2]

The Fifth Circuit nonetheless ruled "that collateral estoppel, under [its] precedent, d[id] not bar a retrial in this case" because petitioner "was also charged with insider trading and money laundering and the jury hung on those counts." Pet. App. 18a. The "problem in this case," the court opined, is that the jury's inability to resolve the insider-trading and money-laundering counts conflicts with its verdict on the other counts. *Id.* at. 22a. The court stated that, if the jury found that petitioner did not have insider information, "then the jury, acting rationally, would also have acquitted [petitioner] of the insider trading counts." *Ibid.* This "potential inconsistency" made it "impossible" for the court "to decide with any certainty what the jury necessarily determined." *Ibid.* The court of appeals thus took "into consideration the mistried counts" and found the jury's indecision on those counts to be dispositive. *Id.* at 23a (citing *United*

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[2] The court of appeals analyzed the jury's findings based solely on the securities fraud verdict, ignoring the other acquittals. As the court of appeals explained, the jury's finding that petitioner "did not possess insider information" in acquitting him of securities fraud made it "unnecessary for [the court of appeals] to determine whether the jury made the same conclusion when it acquitted [petitioner] of the other counts." Pet. App. 22a n.20.

States v. *Larkin*, 605 F.2d 1360, 1370 (5th Cir. 1979), *withdrawn in part on other grounds*, 611 F.2d 585 (5th Cir. 1980)).

The court of appeals analyzed "four possible explanations" for the putative "discrepancy" between the acquittal on securities fraud and the mistrial on the insider-trading and money-laundering counts, but eventually concluded that "it is impossible to determine why the jury hung." Pet. App. 24a. Relying on the perceived impossibility of reconciling the jury's verdict on the fraud counts with the jury's failure to reach a verdict on the other counts, the Fifth Circuit held that petitioner had not carried his burden of establishing that the jury had necessarily found a particular, necessary element unproved in the prior case, and it declined to apply collateral estoppel to bar the reprosecution. *Id.* at 24a-25a.[3]

SUMMARY OF ARGUMENT

I. The Double Jeopardy Clause reflects one of the oldest and most fundamental rules of criminal law—the "universal and humane principle * * * 'that no man shall be brought into danger more than once for the same offense.'" *Ball* v. *United States*, 163 U.S. 662, 668 (1896) (quoting *People* v. *Barrett*, 1 Johns. 66, 74 (N.Y. Sup. Ct. 1806) (Livingston, J., dissenting)).

A. That rule traces back to ancient times and serves important interests. It manifests our society's respect for the finality and sanctity of a jury's verdict of acquittal. It prevents the State from using its enormous

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[3] While the court of appeals stated that a mistried count functions as only one factor to be weighed in Fifth Amendment analysis, the court gave dispositive weight to that factor. The United States thus has agreed that it is possible that "the analysis adopted by the court of appeals will in practice produce the same result as a categorical rule that collateral estoppel never applies in mixed verdict cases." U.S. Br. 14 n.4.

resources to subject the accused to an endless string of stigmatizing accusations that impose not only financial but also emotional hardships. And it guards against the possibility that retrial after retrial may eventually introduce the gravest insult to our system of criminal justice—conviction of the innocent.

B. There is no dispute that the jury in this case unanimously returned a verdict of "not guilty" on the securities fraud charges. Nor is there any dispute that, if one accepts that verdict as rational, it would preclude petitioner's reprosecution here. The Fifth Circuit, however, declined to accept the jury's verdict as binding because the jury also hung—it failed to reach a verdict—on several counts; the Fifth Circuit viewed those two results as conflicting. That reasoning and result cannot be reconciled with the principle that a jury speaks only through its verdict—its unanimous pronouncement. Failure to reach a verdict, by contrast, is the *absence* of a decision; it represents no findings of the jury. It is in effect a nullity, a non-event. To permit a non-verdict to disturb the otherwise preclusive effect of a unanimous verdict ignores the historical significance of verdicts while at the same time according unprecedented legal effect to a non-verdict.

C. The Fifth Circuit's decision also ignores the special historical significance of acquittals. Whatever may be said of the special status of unanimous jury verdicts generally—they represent the voice of the jury—*acquittals* historically have had special significance. The Fifth Circuit's decision, by denying preclusive effect to a verdict of acquittal, simply cannot be reconciled with the unparalleled status of finality the law has historically given acquittals.

D. The Fifth Circuit's decision undermines the very interests the Double Jeopardy Clause was meant to protect: It undermines the individual's ability to take

repose after being found "not guilty" by a jury of peers; it subjects the individual to multiple trials for the same underlying conduct; and, by allowing the government to submit its case to multiple juries in the hope that it can eventually make the case stick, the decision increases the likelihood that an innocent defendant will eventually be convicted through fluke juror error.

II. Modern changes in criminal procedure and criminal law underscore the need to scrupulously honor the historic purposes of the Double Jeopardy Clause.

A. Mistrials due to juror deadlock were virtually non-existent in the Framing era, but are now commonplace. The increased prevalence of mistrials already means that many defendants must undergo the trauma and expense of multiple trials. The protection against multiple trials should not be further eroded by denying actual verdicts of "not guilty" their preclusive effect.

B. The explosive growth in overlapping felonies also underscores the need to accord actual verdicts proper respect. In the Framing era, only one crime generally applied to a particular course of criminal conduct; the same basic conduct thus would rarely constitute multiple crimes that could be prosecuted separately. Today, by contrast, modern criminal codes include multiple, overlapping felonies, presenting a grave risk that defendants will be subject to multiple charges, and in some cases multiple prosecutions, based on the same conduct. Against that new landscape it would be particularly inappropriate to erode the preclusive effect of a jury's actual verdict based on the jury's non-decision on some counts.

ARGUMENT

The Double Jeopardy Clause of the Fifth Amendment reflects one of the most ancient and fundamental rules of criminal law—the "universal and humane principle * * *

'that no man shall be brought into danger more than once for the same offense.'" *Ball* v. *United States*, 163 U.S. 662, 668 (1896) (quoting *People* v. *Barrett*, 1 Johns. 66, 74 (N.Y. Sup. Ct. 1806) (Livingston, J., dissenting)). Predating the Framing, the common law, and Roman law, that prohibition is embodied in laws as ancient as those of Athens (*circa* 300 B.C.) and potentially traceable to biblical sources as well.

The prohibition against subjecting the accused to multiple trials for the same offense serves important interests. It manifests our society's respect for the finality and sanctity of a jury's verdict of acquittal. It prevents the State from using its enormous resources to subject the accused to an endless string of stigmatizing accusations that impose not only financial but also emotional hardships. And it guards against the possibility that retrial after retrial may eventually introduce the most grievous of errors in our system of criminal justice—conviction of the innocent.

There is no dispute that, if the jury's "not guilty" verdict in this case is treated as controlling on all matters the jury rationally must have resolved in reaching that verdict, petitioner cannot be tried on the insider-trading and money-laundering charges he currently confronts. The jury, in rationally finding petitioner "not guilty" of securities fraud, necessarily determined that there was insufficient proof that petitioner possessed material, nonpublic (*i.e.*, "insider") information. Pet. App. 21a. To try petitioner now on insider-trading charges, and derivative money-laundering charges, the government would in effect have to ask a second jury to revisit and contradict a necessary factual determination underlying the verdict of the first jury. That is something that the Double Jeopardy Clause does not permit.

The Fifth Circuit nonetheless ruled that, because the jury "hung" on the insider-trading and money-laundering

counts—it failed to reach a verdict on those charges—the jury's acquittal should not be viewed as having decided that petitioner lacked insider information. That, however, erroneously uses a non-verdict—the failure to reach a verdict on some counts—to impugn the integrity, scope, and effect of an actual jury verdict. That approach cannot be reconciled with the historical sanctity accorded to jury verdicts; with the historical finality accorded to acquittals in particular; or with the important purposes served by the Double Jeopardy Clause.

As a historical matter, the precise situation confronted here—an acquittal on some counts combined with a hung jury on others—would rarely if ever have arisen in the Framing era (or before). At the time of the Framing and under English common law, juries almost always reached verdicts because courts used potentially coercive means to ensure that result. Shortly after the Framing, however, courts departed from those practices and allowed mistrials based on deadlocked juries. By doing so, courts allowed defendants to be subjected to a second trial following an unsuccessful first trial. They justified that result—subjecting the defendant to a second trial before a new jury—under the rubric of "manifest necessity." This case, however, involves the effect of the jury's *actual verdict of acquittal* on certain counts. The fact that courts have now departed from the general rule barring successive retrials cannot justify a further innovation that allows courts to *impugn* the verdict the jury actually reached as irrational, or to disregard the findings that underlie it, based on inferences drawn from the counts on which the jury did not reach a verdict. It is one thing to allow a second trial where there is no prior verdict on the issues to be put before a second jury. But it is quite another to allow a second jury to revisit issues that an earlier jury rationally must have resolved against

the government in finding the defendant "not guilty" in the first trial.

I. Courts May Not Disregard The Otherwise Preclusive Effect Of A Verdict Of "Not Guilty" Based On The Jury's Failure To Reach A Verdict On Other Counts

A. The Double Jeopardy Clause Reflects Long-standing Principles That Serve Important Values

1. The Double Jeopardy Clause provides that "[n]o person shall * * * be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The constitutional protection against double jeopardy traces its roots back to ancient Rome and Greece as a particularized application of the maxim *nemo debet bis vexari pro una et eadem causa*—that no person shall be twice vexed for one and the same cause. See H. Broom, *A Selection of Legal Maxims Classified and Illustrated* 326, 346-350 (8th Am. ed. 1882). Justinian's *Corpus Juris Civilis* thus provided that "[t]he governor should not permit the same person to be again accused of a crime of which he has been acquitted." *The Digest or Pandects* 48.2.7.2, in 11 *The Civil Law* 17 (S.P. Scott trans., 1932). In the 4th century B.C., Demosthenes likewise observed that "the laws forbid the same man to be tried twice on the same issue, be it a civil action, a scrutiny, a contested claim, or anything else of the sort." Demosthenes, *Against Leptines*, in *Olynthiacs, Philippics, Minor Public Speeches, Speech Against Leptines* 589 (J.H. Vince trans., 1930).

The principle that no man may be tried twice for the same cause also has roots in the Bible. Justice Black traced the "opposition to double trials" found in canon law to "the reading given by St. Jerome in 391 A.D. to I Nahum 9 (Douay version), 'there shall not rise a double

affliction.' * * * Jerome drew from this rule that God does not punish twice for the same act." See *Bartkus* v. *Illinois*, 359 U.S. 121, 152 n.4 (1959) (Black, J., dissenting).[4]

By the time of the Framing, the prohibition on double jeopardy was also a well-established feature of English common law. It was a "universal maxim of the common law of England," Blackstone reports, that "no man is to be brought into jeopardy of his life, more than once, for the same offense." 4 W. Blackstone, *Commentaries on the Laws of England* 329 (1769). Criminal defendants confronting successive prosecutions could invoke the common-law pleas of *autrefois acquit* and *autrefois convict*. *Id.* at 329-330; *accord* 3 E. Coke, *Institutes of the Laws of England* 213-214 (1644). Describing *autrefois acquit*, Blackstone stated: "[W]hen a man [was] once fairly found not guilty upon any indictment, or other prosecution * * * he [could] plead such acquittal in bar of any subsequent accusation for the same crime." 4 Blackstone, *supra*, at 329; *accord* 3 Coke, *supra*, at 213-214. The plea of *autrefois convict* similarly operated to bar the Crown from prosecuting a defendant for an offense for which he had already been convicted. 4 Blackstone, *supra*, at 330.

Because only actual verdicts would trigger the protections of *autrefois acquit* and *autrefois convict*, the Crown's prosecutors during the Stuart monarchy developed the "'abhorrent' practice" of discharging a jury whenever it appeared that the Crown's evidence was too weak to produce a conviction. *Arizona* v. *Washington*, 434 U.S. 497, 507-508 & n.23 (1978) (quoting *State* v. *Garrigues*, 2 N.C. 188, 189 (1795)). After discharging the jury, the Crown would then re-indict the hapless defend-

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[4] The book of Nahum appears between Micah and Habakkuk in the Bible. Nahum is thought to have been written near the end of the Assyrian Empire in the 7th century B.C.

ant "at a future day," having had the opportunity to muster "better evidence against him." *Id.* at 508 n.23 (internal quotation marks omitted) (quoting *Garrigues*, 2 N.C. at 189). The English courts promptly curbed that "instrument of tyrannical oppression," *Queen* v. *Charlesworth*, 121 Eng. Rep. 786, 801 (Q.B. 1861), by declaring that—at least in capital cases—"a juror cannot be withdrawn, though the parties consent to it * * * ." *King* v. *Perkins*, 90 Eng. Rep. 1122, 1122 (K.B. 1698).

Thus, at the time of Framing (and well before), the established rule was that, "'whenever, and by whatever means, there is an acquittal in a criminal prosecution, the scene is closed and the curtain drops.'" *United States* v. *Jenkins*, 490 F.2d 868, 872 n.6 (2d Cir. 1973) (quoting counsel in *Duchess of Kingston's Case*, 20 How. St. Tr. 355, 528 (1776)). That rule was then engrafted into the Bill of Rights through the Double Jeopardy Clause. See 1 *Annals of Cong.* 781-782 (J. Gales ed., 1789) (remarks of Rep. Livermore) (noting that the Double Jeopardy Clause was designed to be "declaratory of the law as it [then] stood"); see also *United States* v. *Scott*, 437 U.S. 82, 87 (1978) ("The origin and history of the Double Jeopardy Clause are hardly a matter of dispute.").

2. The longstanding proscription against double trials also precludes the government from seeking to prove to a second jury an element that has already been found absent by a jury at a previous trial. By 1776, the English courts took it as settled, in *Duchess of Kingston's Case*, that a prior judgment precluded relitigation of the same claims (*res judicata*) and relitigation of any issues necessarily resolved in reaching that judgment (issue-preclusion or collateral estoppel). The "judgment of a court of exclusive jurisdiction, directly upon the point" the court stated, "is in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different

purpose."[5] 20 How. St. Tr. at 535. By the 19th century, English courts pronounced that "the criminal law is in unison with that which prevails in civil proceedings," holding that a verdict in a prior criminal case would preclude the government from relitigating in later cases any issues the first jury necessarily decided, even where different charges were brought (and therefore a plea of *autrefois acquit* or *autrefois convict* would not apply in the strict sense). *Queen* v. *Miles*, 24 Eng. Rep. 423, 431 (Q.B. 1890).

This Court has reached the same conclusion. The Double Jeopardy Clause's prohibition on retrying a defendant following acquittal, the Court has held, also precludes the government from retrying any issue necessarily decided in the first trial. *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970). As Justice Holmes explained almost a century ago, it would make little sense to accord greater protection to the integrity and finality of a verdict in a civil matter than to a verdict of "not guilty" in a criminal case: "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." *United States* v. *Oppenheimer*, 242 U.S. 85, 87 (1916). Thus, "when an issue of ultimate fact has once been determined by a valid and final judgment" of acquittal, that issue "cannot again be litigated" against the defendant in connection with a separate, but factually related, offense. *Ashe*, 397 U.S. at 443.

3. The Double Jeopardy Clause protects important interests. In one sense, it protects the interest of finality—declaring the jury's determination to be the last

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[5] Although the doctrine of collateral estoppel has deep historic roots, the term "collateral estoppel" was first devised by the drafters of the Restatement (First) of Judgments § 68 (1942). See A.W. Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 3 & n.4 (1942).

word on the subject. Finality, of course, has long been considered essential to the administration of justice in an orderly society. "For unless every judgment should at some point become final, and have the quality of establishing its contents as irrefragable truth, litigation would become interminable, the rights of parties would be involved in endless confusion, the courts stripped of their most efficient powers, would become little more than advisory bodies, and thus the most important function of government—that of ascertaining and enforcing rights—would go unfulfilled." 2 H.C. Black, *A Treatise on the Law of Judgments* § 500 (1891).

In the criminal context, moreover, finality—and the sanctity of the jury's verdict—protects individual liberty. Criminal proceedings impose severe psychological and financial hardships. *Green* v. *United States*, 355 U.S. 184, 187 (1957). By protecting the finality and sanctity of a jury's verdict of acquittal, the Double Jeopardy Clause ensures that those accused of crimes but acquitted do not have to live in a "continuing state of anxiety and insecurity," never knowing when they might again be called on to endure the "embarrassment, expense, and ordeal" of another prosecution. *Ibid.*

The Double Jeopardy Clause also preserves the interests of accuracy and the right to trial by a jury of one's peers. It ensures that the government cannot circumvent the jury's solemn verdict by trying the case before jury after jury after jury until it obtains a verdict to its liking. And it guards against the ultimate injustice—the conviction of an innocent person. Serial prosecutions necessarily raise the risk that a jury will eventually convict whether that conviction is warranted or not. The Double Jeopardy Clause thus ensures that the government, "with all its resources and power," cannot "enhanc[e] the possibility that even though inno-

cent [a defendant] may be found guilty." *Green*, 355 U.S. at 187-188.

B. The Fifth Circuit's Decision Is Inconsistent With The Historic Sanctity Of A Jury's Verdict

The Fifth Circuit did not dispute that, consistent with historical practice, the Double Jeopardy Clause precludes the government from attempting to prove, before a second jury, the same issue an earlier jury necessarily resolved against it. The Fifth Circuit, however, relied on the jury's *failure to reach a verdict* on certain counts to deny the first jury's verdict of preclusive effect. That ruling cannot be reconciled with the historic sanctity accorded to jury verdicts. It disregards the special status that verdicts of acquittal have in our system of justice. And it wholly divorces the Double Jeopardy Clause from the important values it protects.

1. In our criminal justice system, the jury speaks *only* through its verdict. Even at the time of the Framing, the law flatly rejected efforts to impugn, narrow, or second-guess the verdict through other means—including efforts to impeach a jury's verdict with the support of the jurors themselves. For example, in *Vaise* v. *Delaval*, 99 Eng. Rep. 944 (K.B. 1785), juror affidavits revealed that the jury had arrived at its verdict by tossing a coin. Despite characterizing the jury's conduct as "a very high misdemeanor," Lord Mansfield refused to impeach the jury's verdict by considering the juror affidavits. *Id.* at 944. Early American courts widely adopted "Mansfield's Rule" against impeaching the jury's verdict by inquiring into deliberations. See 8 J.H. Wigmore, *Evidence in Trials at Common Law* § 2349, at 681-690 & n.2 (McNaughton rev. ed. 1961) (collecting early American cases).[6]

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[6] See also *Grinnel* v. *Phillips*, 1 Mass. 530, 542 (1805) (Sewall, J.) ("[T]he secret intention or mental act of a juror can never be a

That rule does not merely reflect the accepted notion that jury deliberations are confidential. It also reflects the principle that the jury speaks as a body *through its verdict*, and that efforts to impeach or otherwise diminish the verdict are not tolerated. Chief Justice Shaw, writing for the Supreme Judicial Court of Massachusetts, thus explained:

> [T]he general rule is that affidavits of jurors will not be received to prove any mistake of the evidence or misapprehension of the law, on the part of the jury. Different jurors, according to their different degrees of intelligence, of attention and habits of thought, may entertain different views of the evidence, and of the instructions of the court in point of law. *But the verdict, in which they all concur, must be the best evidence of their belief*, both as to the fact and the law, *and therefore must be taken to be conclusive.*

Murdock v. *Sumner*, 22 Pick. 156, 157 (Mass. 1839) (emphasis added). Thus, "the verdict as uttered is the *sole embodiment of the jury's act* and must stand as such without regard to the motives or beliefs which have led up to its act." 8 Wigmore, *supra*, § 2349, at 681 (emphasis added).

This Court has correspondingly prohibited efforts to inquire into jury deliberations for other purposes, such as determining which issues the jury necessarily decided. See *Packet Co.* v. *Sickles*, 72 U.S. 580, 593 (1866). That policy is so strong that this Court has refused to consider even a judge's testimony regarding the decision-making

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subject of legal inquiry."); *Wright* v. *Ill. & Miss. Tel.*, 20 Iowa 195, 1866 WL 140, at *8 (1866) ("[A]ffidavits of jurors will not be received to show the detail of the deliberations of the jury, or that they or one or more of them misunderstood the evidence or instructions, or did not agree to the verdict.").

process to show the meaning of a verdict in a bench trial. See *Fayerweather* v. *Ritch*, 195 U.S. 276, 306-307 (1904). Instead, any inquiry into the meaning of a verdict "should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration, and then the record, *which furnishes the only proper proof of the verdict.*" *Sickles*, 72 U.S. at 593 (emphasis added). In other words, the jury's *verdict* must be taken as the *embodiment* of a jury's rational application of the law to the facts. Courts determining the effect of that verdict must ask "whether a *rational jury* could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444 (emphasis added) (internal quotation marks omitted).

2. The Fifth Circuit's decision is inconsistent with those principles. The Fifth Circuit agreed that, if one accepts the jury's verdict of "not guilty" on the securities-fraud charge as rational, that verdict precludes retrial on the charges at issue here. As that court explained, the acquittal standing alone necessarily reflects the jury's finding that petitioner did not have inside information. See Pet. App. 21a-22a ("[C]onsidering the acquittals by themselves, it appears that [petitioner] is correct that collateral estoppel bars a retrial."). The Fifth Circuit, however, declined to accept the jury's verdict of "not guilty" on its face because, in its view, that verdict was inconsistent with the jury's *failure to reach a verdict* on the insider-trading charges. *Id.* at 24a-25a.

But that treats the absence of a verdict on certain counts as impugning the rationality of the verdict the jury did reach. The established rule is to the contrary: The jury's "*verdict, in which they all concur,* must be the *best evidence* of their belief, both as to the fact and the law, *and therefore must be taken to be conclusive.*"

Murdock, 22 Pick. at 157 (emphasis added). The jury's verdict cannot be treated as less than conclusive merely because the jury failed to reach a verdict (and thus failed to concur) on other counts.

Treating the jury's failure to reach a verdict on certain counts as undermining the preclusive effect of the verdict the jury did issue is particularly problematic because the failure to reach a verdict is just that—the absence of decision, a nullity. It conveys no determinations of any sort. When it hangs, "the jury makes *no decision at all*." *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 117 (2003) (O'Connor, J., concurring) (emphasis added); *United States* v. *Ohayon*, 483 F.3d 1281, 1289 (11th Cir. 2007) ("[T]he failure of a jury to reach a verdict is not a decision; it is a failure to reach a decision."). Because the jury did not reach a verdict on the unresolved counts here, "the jury did not make any findings at all as to" those counts. *United States* v. *Fields*, 251 F.3d 1041, 1044 (D.C. Cir. 2001).[7] Nor is there any basis in history for treating the failure to reach a verdict as embodying any findings. There is no evidence that the jury's failure to reach a verdict on certain counts was accorded weight at the time of the Framing, if for no other reason than that juries virtually never hung in that era; to the contrary, juries were *required* to reach a verdict. See pp. 26-27, *infra*. And there certainly is no evidence that the common-law courts would have viewed a hung jury as grounds for questioning the rationality of the verdict the jury did reach, much less for limiting its otherwise preclusive scope.

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[7] Under the Sixth Amendment, moreover, jurors in federal cases must reach their verdict unanimously. *Andres* v. *United States*, 333 U.S. 740, 748 (1948). When a jury hangs on a count, that unanimity is absent.

The jury's failure to reach a verdict on certain counts thus is, in the eyes of the law, a non-unanimous nullity—a non-decision devoid of legal effect. Such a non-decision provides no basis for impugning the verdict the jury actually and unanimously reached. Nor is it grounds for refusing to give that verdict the weight and consequences that it would otherwise have. Courts may "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter" to determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444 (internal quotation marks omitted). But a court may not use a jury's *failure to reach a decision* to question the *rationality* of the jury's unanimous verdict and to deem it unworthy of respect (or to rest on no findings at all). The accused's constitutional rights must depend on what the jury says in its verdict. Those rights cannot depend on extrapolations from what the jury chose not to decide.[8]

C. The Fifth Circuit's Decision Is Inconsistent With The Historically Special Weight Given To Verdicts Of "Not Guilty"

Even apart from the impropriety of impugning a jury verdict by pointing to the indecision of a non-verdict, the Fifth Circuit's approach collides with the historically special status of verdicts of "not guilty," *i.e.*, acquittals.

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[8] It is, of course, a different matter when a jury returns conflicting *verdicts*, unanimously agreeing on outcomes that cannot be reconciled with each other. See *United States* v. *Powell*, 469 U.S. 57, 64-69 (1984). In such cases, respect for the jury's decision-making power requires courts to give effect to *both* verdicts, notwithstanding their inconsistency, and to deny preclusive effect to either verdict. See *id.* at 68-69. That, however, hardly justifies giving a non-verdict—a hung jury's failure to decide an issue—priority over the verdict of acquittal the jury actually and unanimously reached.

The Framers understood that judgments of acquittal (unlike conviction) are subject to a rule of "absolute finality," *Burks* v. *United States*, 437 U.S. 1, 16 (1978): "'[W]henever, and by whatever means, there is an acquittal in a criminal prosecution, the scene is closed and the curtain drops.'" *Jenkins*, 490 F.2d at 872 n.6 (quoting counsel in *Duchess of Kingston's Case*, 20 How. St. Tr. at 528).

It is that rule of absolute finality that precludes the government from appealing even in the face of legal error. Early common-law decisions permitted the Crown to appeal acquittals, but by the early 18th century that power was limited to instances where the error was plain from the face of the record or the defendant had obtained an acquittal through fraud. See M. Friedland, *Double Jeopardy* 286-287 (1969). Even then, appeals were heavily disfavored and rarely used. *Id.* at 286 & n.4. Canvassing the relevant authorities over a century ago, this Court observed that "from the time of Lord Hale * * * the text-books, with hardly an exception, either assume or assert that the defendant * * * is the only party who can have either a new trial or a writ of error * * * and that a judgment in his favor is final and conclusive." *United States* v. *Sanges*, 144 U.S. 310, 312 (1892).

Today, this Nation's courts continue to accord acquittals absolute finality, prohibiting government appeals from verdicts of not guilty.[9] As a result, it is now "one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an

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[9] For years, the United States was prohibited by statute from appealing an acquittal under any circumstances. *Scott*, 437 U.S. at 88. Once Congress removed the statutory barriers to appeal by the United States, this Court confirmed that the Double Jeopardy Clause prohibits the government from appealing acquittals. *United States* v. *Wilson*, 420 U.S. 332, 353 (1975).

appeal" of a verdict of acquittal. *Green*, 355 U.S. at 188; see also *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) ("Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal * * * could not be reviewed * * * without putting [a defendant] twice in jeopardy.'" (quoting *Ball*, 163 U.S. at 671)).

Correspondingly, "the law attaches particular significance to an acquittal." *Scott*, 437 U.S. at 91; see also *United States* v. *DiFrancesco*, 449 U.S. 117, 129 (1980) ("An acquittal is accorded special weight."). Once "the innocence of the accused has been confirmed by a final judgment, the Constitution *conclusively presumes* that a second trial would be unfair." *Washington*, 434 U.S. at 503 (emphasis added).[10] That contrasts sharply with the legal treatment of convictions and mistrials. Unlike acquittals, convictions are not absolutely final; they are appealable, and reversal can result in a second trial.[11] Mistrials producing no verdict have an even lesser status. At common law, they were given no effect at all: Jeopardy did not attach until trial was completed and a final verdict was rendered. See *Vaux's Case*, 76 Eng. Rep.

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[10] That rule applies whether an acquittal is granted by jury or judge, *Martin Linen*, 430 U.S. at 571, or at trial or on appeal, *Burks*, 437 U.S. at 18, and whether or not there is reason to doubt the soundness of the acquittal, *Fong Foo* v. *United States*, 369 U.S. 141, 143 (1962).

[11] A verdict of guilty, unlike an acquittal, does not automatically terminate jeopardy and thereby prevent the defendant from being tried again for the same offense. See *Justices of Boston Mun. Ct.* v. *Lydon*, 466 U.S. 294, 308 (1984) ("Acquittals, unlike convictions, terminate the initial jeopardy."). Accordingly, where a defendant successfully appeals a conviction on grounds unrelated to the sufficiency of the evidence, "it has long been settled * * * that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying [him]." *Lockhart* v. *Nelson*, 488 U.S. 33, 38 (1988).

992, 992 (K.B. 1591); M. Hale, *Pleas of the Crown* 244-245 (5th ed. 1716). Consequently, the double-jeopardy protections embodied in the pleas of *autrefois acquit* and *autrefois convict* were strictly limited to cases that resulted in verdicts; there was no plea of *autrefois sans verdict*. See *Crist* v. *Bretz*, 437 U.S. 28, 33 (1978); 3 J. Story, *Commentaries on the Constitution of the United States* § 1781, at 659-660 (1833).

While it is now established that jeopardy attaches when the jury is empanelled—and that a mistrial may therefore preclude retrial—the jury's failure to reach a verdict still lacks the absolute status of an acquittal. Retrial remains permissible if discharging the jury is a "manifest necessity." *Washington*, 434 U.S. at 503, 514-516; *United States* v. *Dinitz*, 424 U.S. 600, 606-611 (1976) (holding that a defendant may be retried after a mistrial where a defendant moves for a mistrial, unless it can be shown that the government purposefully provoked the defendant's request). Even today, the consequences are "definitely [different] in cases where the trial has not ended in an acquittal." *DiFrancesco*, 449 U.S. at 130.

The Fifth Circuit's decision is impossible to reconcile with the "particular significance" and "absolute finality" the law attaches to verdicts of "not guilty." In this case, the jury unanimously concluded that petitioner was not guilty of certain offenses; standing alone, that verdict necessarily would have precluded a second trial on the insider-trading and money-laundering counts the United States now seeks to bring. Even if one were to assume that the jury's failure to reach a verdict on the insider-trading and money-laundering counts in the first trial has any status in the eyes of the law (and it does not, see pp. 19-21, *supra*) that failure to agree unanimously lacks the special significance and absolute finality this Court traditionally accords verdicts of acquittal. Whatever the mistried counts' impact in other contexts, they provide no

basis for denying the acquittal verdict the jury did issue its ordinary preclusive effect, and they surely cannot be used to impugn the rationality of the jury's actual verdict. Because the Fifth Circuit did those things nonetheless, its judgment cannot stand.

D. The Fifth Circuit's Decision Undermines The Double Jeopardy Clause's Historic Mission

The Double Jeopardy Clause guarantees a defendant, first and foremost, that he will not be forced to defend himself again after twelve of his peers unanimously find that the government did not prove him guilty. The Fifth Circuit's decision undercuts that historical guarantee and threatens to produce precisely the results that the Double Jeopardy Clause protects against—seriatim trials at which the government, dissatisfied with the findings of the first jury, seeks a different result before another. In doing so, it exposes the accused to precisely the anxiety and insecurity the Double Jeopardy Clause was designed to prevent.

The Fifth Circuit's decision, moreover, denies the jury's verdict the sanctity the law traditionally accords it. Even though a unanimous jury determined that petitioner is not guilty of securities fraud—and that verdict rationally must encompass a finding that petitioner lacked insider information—the Fifth Circuit would allow the government to pursue petitioner yet again on the theory that the first jury in effect erred in its finding or was irrational. Finally, the Fifth Circuit's decision to give the government multiple bites at the apple dramatically increases the risk of convicting the innocent. See *Green*, 355 U.S. at 188. One jury has now determined that petitioner did not have insider information. There is no guarantee that the next jury will decide that issue more accurately. And if the same issue is put to a sufficient number of juries, the likelihood of an erroneous conviction rises markedly.

II. Modern Changes To Our System Of Criminal Justice Underscore The Importance Of Double Jeopardy Rights In This Context

While the history and origins of the Double Jeopardy Clause all but foreclose the Fifth Circuit's approach, changes in criminal procedure and our criminal laws underscore the necessity of according jury verdicts of "not guilty" preclusive effect in later prosecutions. At the time of the Framing, hung juries were a rarity, and felony offenses were relatively few and discrete. There was thus little risk that a defendant would end up being tried twice—or more—for the same underlying conduct. Today, by contrast, it is not uncommon for juries to hang, and the U.S. Code (to say nothing of state law) contains a dizzying array of often overlapping criminal prohibitions. Allowing for hung juries, and thus multiple trials for a single offense, may be a "manifest necessity" and thus tolerable notwithstanding the express prohibitions of the Double Jeopardy Clause. But that limited innovation cannot provide grounds for further eroding double-jeopardy protections by licensing courts to disregard the otherwise preclusive impact of a judgment of acquittal.

A. The "Manifest Necessity" Of New Trials In Cases Involving Deadlocked Juries Cannot Justify Disregarding The Impact Of The Verdict The Jury Did Reach

At English common law, juries were largely precluded from failing to reach a verdict. Blackstone reported that "the jury cannot be discharged till they have given in their verdict." 4 Blackstone, *supra*, at 354. The practices of the era went to great lengths to ensure that a verdict would be reached. Jurors could be deprived of "meat, drink, fire, or candle * * * till they * * * all unanimously agreed." 3 Blackstone, *supra*, at 375. Where those measures did not succeed in producing a verdict, the courts sometimes turned to imprisonment. *Id.* at 376.

And, if that did not work, the presiding judge could carry the jurors "round the circuit from town to town in a cart" until a unanimous decision was reached. *Ibid.*

Similar practices were utilized in early America. See 38 Ill. Rev. Stat. § 745 (repealed Jan. 1, 1964) (requiring that criminal juries be kept "without meat or drink (water excepted) * * * until they shall have agreed upon their verdict"); S. Kassin, *The American Jury: Handicapped in the Pursuit of Justice*, 51 Ohio St. L.J. 687, 709 (1990) ("Judges used to urge deadlocked juries to resolve their disagreements through such coercive measures as the denial of food and drink, excessive deliberation hours, and the threat of confinement."). As a result, mistrials were virtually non-existent at the time of the Framing. In the middle of the 18th century, for example, Virginia saw fewer than one jury per year fail to reach a verdict. D. Blinka, *The Virginia Experience*, 71 U.M.K.C. L. Rev. 529, 580 (2003). The rate of hung juries was even lower in colonial New Jersey, where not one jury hung in a criminal case between 1749 and 1757. See G. Thomas, *Colonial Criminal Law & Procedure: The Royal Colony of New Jersey, 1749-57*, 1 N.Y.U. J.L. & Liberty 671, 703-704 tbl.1 (2005). And in the federal court system, the first known mistrial resulting from jury deadlock did not occur until 1807. See *United States* v. *Workman*, 28 F. Cas. 771 (D. La. 1807). Not until 1824 did this Court definitively declare that a jury could be discharged before verdict in situations of "manifest necessity." See *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

Courts, of course, have properly abandoned the coercive techniques that tended to prevent juror deadlock in the Framing era. As a result, however, juries now find themselves unable to reach verdict in a startlingly large number of cases. In the 1950s, for example, jury deadlocks led to mistrials in approximately 5.5% of criminal

trials. H. Kalvin & H. Zeisel, *The American Jury* 56-57, tbl.11 (1966). More recent studies have produced similar results, and some jurisdictions have rates approaching 20 percent.[12]

Because courts cannot (and ought not) return to the coercive methods of avoiding juror deadlock that were employed at the time of the Framing, the judicial system has adapted. Retrials—a second trial for the same offense—are now a "manifest necessity" in cases where jurors deadlock. That is not without its costs: It seriously erodes the purposes underlying the Double Jeopardy Clause. It subjects the individual to multiple trials; prolongs his period of uncertainty and anxiety; and pits the individual of limited means repeatedly against a government of enormous resources. But the fact that our system now tolerates those erosions cannot justify further undermining constitutional protections by denying the jury's *actual verdict* of acquittal its otherwise preclusive effect. Yet that is what the Fifth Circuit did here.

B. The Explosive Growth Of Overlapping Felonies Underscores The Need To Give Actual Verdicts Proper Weight

The dangers to Double Jeopardy posed by serial retrials are exacerbated by the explosive growth of overlapping felonies in federal criminal law. At the time of the Framing, there was little risk that a defendant could face multiple criminal charges based on the same basic

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[12] According to a 2002 report conducted by the National Center for State Courts, 6.2% of state-court prosecutions result in a mistrial due to a hung jury. P. Hannaford-Agor, *et al.*, *Are Hung Juries a Problem?* 20 (2002), http://ncsonline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf. In Los Angeles, however, juries hang on at least one count in 19.5% of cases, while jurors in the District of Columbia hang on at least one count in 22.3% of cases. *Id.* at 41. In federal criminal cases, between 1980 and 1997, juries hung in approximately 2.1% to 3% of cases. *Id.* at 22.

conduct. Historically, "offense categories were relatively few and distinct." *Ashe*, 397 U.S. at 445 n.10. At the end of the 13th century, for example, apart from treason, there were only nine felony offenses. 2 F. Pollock & F.W. Maitland, *History of English Law* 470 (1898). During the era of Lord Coke, this number increased modestly to approximately 30. 2 J. Stephen, *A History of the Criminal Law of England* 219 (1883). By the time of the Framing, there were just 160 potential felony offenses. *Ibid.* Thus, "[a]t common law, and for a time after the adoption of the Constitution, one criminal act or a series of acts in a single plan was likely to yield only one offense." D. Mayers & F. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 29 (1960).

The landscape has since changed dramatically. Criminal statutes have been enacted at an alarming rate, with ever-increasing overlap and specificity. See *Ashe* 397 U.S. at 455 n.10; see also Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 Yale L.J. 339, 344 (1956) ("The tendency of modern penal legislation has been toward more detailed specification of criminal offenses, so that a single criminal act or transaction comes under the proscription of a steadily increasing number of statutes."). The Justice Department has estimated that, in 1989, there were approximately 3,000 federal crimes on the books. See R. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 Crim. L.F. 99, 110 (1989). By 2000, that number had jumped to over 4,000. J. Baker & D. Bennett, *Measuring the Explosive Growth of Federal Crime Legislation* 8 (2004). The nine years since have witnessed the creation of another 452 federal crimes—or about 56.5 crimes per year. J. Baker, *Revisiting the Explosive Growth of Federal Crimes* 1 (2008). "[O]f all federal crimes enacted

since 1865, over forty percent have been created since 1970." E. Meese & W. Taylor, ABA Task Force on the Federalization of Criminal Law, Preface, *The Federalization of Criminal Law* 2 (1998).

That explosion of criminal offenses, combined with their great specificity and overlap, now makes it "possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 445 n.10; see also *id.* at 452 (Brennan, J., concurring) ("Given the tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes, the opportunities for multiple prosecutions for an essentially unitary criminal episode are frightening."). This Court, of course, cannot proscribe opportunistic charging decisions; the Executive Branch has sole authority to enforce the law. Nor can this Court rewrite and simplify the Nation's criminal laws; that task is within the purview of the legislature. But the Court ought not give the Double Jeopardy Clause a crabbed interpretation that prevents it from reaching the evils at which it was historically directed. The government is entitled to try a defendant once for a crime and, if the jury reaches no verdict at all, to try the defendant yet again. But when the jury does reach a verdict of "not guilty" on one of the many overlapping crimes that Congress has created and the Executive has chosen to prosecute, the Court should accord *that verdict* its full preclusive effect without regard to what the jury did not decide.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX
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AMICUS CURIAE BRIEF

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Supreme Court, U.S.
FILED
JAN 19 2009
OFFICE OF THE CLERK

8612

No. 08-67

In the
Supreme Court of the United States

F. SCOTT YEAGER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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4APS06

QUESTION PRESENTED

Whether, when a jury acquits a defendant on multiple counts but fails to reach a verdict on other counts that share a common element, and, after a complete review of the record, the court of appeals determines that the only rational explanation for the acquittals is that an essential element of the hung counts was determined in the defendant's favor, collateral estoppel bars a retrial on the hung counts.

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of more than 12,500 attorneys and more than 35,000 affiliate members from all 50 States. NACDL is the only national professional bar association that represents public defenders, private criminal defense lawyers, and law professors. Founded in 1958, NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs in this Court and other courts throughout the country.

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[1] No party or counsel for a party authored any part of this brief, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The doctrine of collateral estoppel is "embodied in the Fifth Amendment guarantee against double jeopardy" and applies fully in criminal cases. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970). The doctrine acts to prevent the government from prosecuting a defendant for a crime that requires proof of a fact that was "actually and necessarily decided in the defendant's favor" by an earlier jury's verdict of acquittal. *Schiro v. Farley*, 510 U.S. 222, 236 (1994). In its decision below, the Fifth Circuit wrongly held that a jury's failure to return a verdict on one count of a multi-count indictment can be "weighed" against the jury's judgment of acquittal on a factually overlapping charge in a way that fatally undermines the collateral-estoppel consequences of that acquittal. Pet. App. 27a. The Fifth Circuit's decision creates a rule that effectively abolishes the collateral-estoppel doctrine in increasingly common multi-count prosecutions that result in partial verdicts.

Collateral estoppel is an essential component of the Double Jeopardy Clause. The doctrine works both to protect judgments of acquittal and to prevent successive prosecutions. The Fifth Circuit's decision is in the teeth of these two core constitutional principles.

First, by "weighing" mistried counts in the collateral-estoppel calculus, the decision will invariably lead to the unconstitutional disregard of juries' judgments of acquittal, thus destroying the "special weight" that acquittals have historically been given in the double-jeopardy analysis. That is because "weighing" a jury's failure to reach a decision on a factually overlapping charge—a failure that means absolutely nothing for

double-jeopardy purposes—will by definition create uncertainty that will prevent a defendant from carrying his burden of proving that an issue of ultimate fact was *actually and necessarily* decided in his favor by his earlier acquittal. The Fifth Circuit's decision perfectly illustrates the problem. In rejecting Yeager's assertion that collateral estoppel barred his retrial, the court unsurprisingly found—*after* "consider[ing] the hung counts along with the acquittals"—"a potential inconsistency, making it impossible for [it] to decide with any certainty what the jury necessarily determined." Pet. App. 22a. In order to come to that conclusion, however, the court had to disregard Yeager's acquittals, which, standing alone, indicated "that Yeager is correct that collateral estoppel bars a retrial." *Id.* The Fifth Circuit's "weighing," therefore, is tantamount to a *per se* no-estoppel rule (a point the Government more or less concedes) that fatally devalues judgments of acquittal.

Second, the Fifth Circuit's decision creates a gaping hole in the Double Jeopardy Clause's protections against successive prosecutions. By allowing a jury's failure to reach a verdict on one count to trump an acquittal in a partial-verdict case, the decision perversely incentivizes the government to charge as many overlapping counts as possible—and to do so precisely so that it can avoid the collateral-estoppel consequences of any acquittal that might result. That is because, under the Fifth Circuit's approach, when a jury acquits a defendant on some counts but hangs on another with a related element, the government is free to retool its case against the defendant on the mistried count in a future prosecution even where the acquittals, when "consider[ed] ... by themselves," would estop the prosecution of the mistried count. Pet. App. 21a-22a. By rewarding prosecutors for

overcharging their cases and then failing to prove the superfluous counts, the Fifth Circuit's decision thus turns the Double Jeopardy Clause on its head. Moreover, the practical threat posed by the Fifth Circuit's decision is very real given (1) the exponential growth of criminal codes and (2) the evidence that indicates, unsurprisingly, that juries hang more frequently in cases involving numerous and complicated counts.

ARGUMENT

This case presents a question of vital importance to the criminal justice system: Whether, consistent with the Double Jeopardy Clause, a jury's failure to reach a decision on one count of a multi-count indictment (here, the "hung" or "mistried" count) can be "weighed" against an acquittal on a factually related count in a manner that fatally undermines the acquittal's collateral-estoppel effect for future prosecutions. "Part[ing] ways with [its] sister circuits," the Fifth Circuit held that weighing mistried counts against acquitted counts is constitutionally unproblematic. Pet. App. 27a. That is incorrect. An affirmance here would eviscerate the collateral-estoppel doctrine as it applies to an increasingly large swath of criminal cases, particularly in this age of overlapping federal offenses that provide multiple means of imposing criminal liability for the same underlying conduct. And by rendering the collateral-estoppel doctrine a dead letter in these cases, an affirmance would contradict the fundamental purposes of the Double Jeopardy Clause and its constituent collateral estoppel doctrine—namely, the preservation of acquittals and the prevention of successive prosecutions.

I. *Ashe v. Swenson* Firmly Established Collateral Estoppel As A Rule Of Constitutional Criminal Procedure.

The doctrine of collateral estoppel operates as "an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). This Court in *Ashe* recognized that collateral-estoppel principles are "embodied in the Fifth Amendment guarantee against double jeopardy" and apply with full force in criminal cases. *Id.* at 445.

As a rule of constitutional criminal procedure, collateral estoppel operates to prevent the government from prosecuting a defendant for a crime that requires proof of a fact previously decided in the defendant's favor by an earlier jury's verdict of acquittal. The critical question is whether the particular fact was "actually and necessarily decided" for the defendant as part of the earlier acquittal. *Schiro v. Farley*, 510 U.S. 222, 236 (1994). If it was, then the government is barred—collaterally estopped—by the Double Jeopardy Clause from re-prosecuting.

In deciding for "constitutional collateral estoppel" purposes whether a fact was "actually and necessarily decided" in the defendant's favor, *id.*, "a court [must] 'examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from considera-

tion.'" *Ashe*, 397 U.S. at 444 (internal citation omitted). Collateral-estoppel doctrine, therefore, "is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Id.* A court's review, in other words, "'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Id.* (internal citation omitted). The point of the pragmatism is clear: "Any test more technically restrictive would ... simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Id.*

To be clear, *Ashe* hardly gives criminal defendants a free pass. Under *Ashe*, it is the acquitted defendant—not the government—who bears the burden of proof. In particular, in order to invoke collateral estoppel to prevent successive prosecution on a factually overlapping charge, the defendant must demonstrate that a fact necessary to the government's case was "actually and necessarily decided" in his favor as part of his earlier acquittal. *Schiro*, 510 U.S. at 236; *accord Dowling v. United States*, 493 U.S. 342, 350-51 (1990) (same). Even at that doctrinal level, therefore, *Ashe* erects a high bar, which significantly limits collateral estoppel's real-world operation. *See Dowling*, 493 U.S. at 358 (Brennan, J., dissenting). And in actual practice, *Ashe* will have substantive bite in only a fraction of prosecutions. The reason is that in the overwhelming majority of cases defendants will present alternative theories to the jury. A robbery defendant, for instance, may contend that the prosecution failed to prove either (1) that he intended to permanently deprive the alleged victim of his property or (2) that he used force or intimidation. In that scenario, if the jury acquits in a general verdict, there will be no way to know

which of the defendant's theories prevailed—*i.e.*, what the jury "actually and necessarily decided"—and the *Ashe* rule will be inoperative.

This case, however, is unique. Yeager falls squarely within the narrow-but-essential protection of *Ashe*. Yeager was charged in a 127-count indictment with securities fraud, wire fraud, conspiracy to engage in securities and wire fraud, insider trading, and money laundering. Yeager Br. 3. After a 13-week trial, the jury acquitted Yeager on all securities fraud, wire fraud, and conspiracy counts, hung on the insider-trading and money-laundering counts, and, notably, convicted Yeager of nothing. Yeager Br. 10, 21. After examining the record in accordance with *Ashe*, the Fifth Circuit correctly found that "the jury, acting rationally, could have acquitted Yeager on securities fraud *only* by concluding that he did not have insider information." Pet. App. 18a (emphasis added). And as the court correctly recognized, that apparent determination, on its own terms, should "preclude[] the Government from now prosecuting him on insider trading and money laundering," both of which would require a finding that Yeager actually *did* possess insider information. *Id.* at 21a. Under a straightforward application of controlling precedent, then, the Government's attempt here to institute new insider-trading and money-laundering charges—and thus to attempt to prove (once again) a fact that the first jury "actually and necessarily decided" in Yeager's favor by its verdict of acquittal—should be barred.

Straying from its own premise, the Fifth Circuit reached a contrary conclusion based on logic that, if credited, would eviscerate the collateral-estoppel doctrine—and *Ashe*—in a host of multi-count prosecutions. In par-

ticular, after "consider[ing] the hung counts along with the acquittals," the court found "a potential inconsistency, making it impossible for [it] to decide with any certainty what the jury necessarily determined" in acquitting Yeager. *Id.* at 22a. That uncertainty, the court held, foreclosed Yeager's collateral-estoppel argument. Thus, in performing its *Ashe* analysis, rather than focusing on the jury's actual decisions—the acquittals—the Fifth Circuit instead gave controlling weight to the jury's *failure to reach a decision* on the factually related insider-trading and money-laundering counts. As explained in the next Part, in doing so the Fifth Circuit created what amounts to a partial-verdict loophole in the collateral-estoppel doctrine—a loophole that undermines the very principles that the Double Jeopardy Clause was designed to protect.

II. The Fifth Circuit's Decision Eviscerates The Collateral-Estoppel Doctrine In Multi-Count Prosecutions That Result In Partial Verdicts.

Double-jeopardy protections against multiple prosecutions address two fundamental concerns in our legal system. First, the Double Jeopardy Clause is specifically designed to safeguard final judgments—and, in particular, verdicts of acquittal. *See, e.g., United States v. Scott*, 437 U.S. 82, 92 (1978) ("[T]he primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment."). Second, and relatedly, the Clause ensures that an acquitted defendant is not subjected to a do-over in which the prosecutor hopes to refine his case or strike a more favorable jury. *See, e.g., Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("'[T]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence

which it failed to muster in the first proceeding.'" (quoting *Burks v. United States*, 437 U.S. 1, 11 (1978)). Collateral estoppel, as applied by this Court in *Ashe*, addresses the very same two concerns. *See Crist v. Bretz*, 437 U.S. 28, 33 (1978) ("A primary purpose" served by the Double Jeopardy Clause is "akin to that served by the doctrines of res judicata and collateral estoppel—to preserve the finality of judgments."); *Ashe*, 397 U.S. at 446 (Collateral estoppel "protects a man who has been acquitted from having to 'run the gantlet' a second time.") (internal citation omitted).

The Fifth Circuit's decision below ignores—and worse, actually undermines—both of these double-jeopardy principles. First, by "weighing" mistried counts in the collateral-estoppel analysis, the decision eliminates the special significance that has traditionally been accorded acquittals. And second, by allowing a mistried count to trump an acquittal in a partial-verdict scenario, the decision incentivizes prosecutors to overcharge criminal defendants as an insurance policy in the event that the jury acquits on some counts but hangs on others.

A. The Fifth Circuit's Decision Undermines The Integrity Of Final Judgments And The Special Significance Given To Acquittals.

This Court's double-jeopardy decisions make one point absolutely clear: An acquittal is a constitutionally significant event that is "accorded special weight" in the Fifth Amendment analysis. *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980); *Tibbs*, 457 U.S. at 41 (same); *accord Poland v. Arizona*, 476 U.S. 147, 156 (1986) ("'[T]he law attaches particular significance to an acquit-

tal.'" (quoting *Scott*, 437 U.S. at 91 (1978)). "The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal, for the public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though the acquittal was based upon an egregiously erroneous foundation." *DiFrancesco*, 449 U.S. at 129 (internal quotations and citations omitted). Put slightly differently, "[i]f the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." *Arizona v. Washington*, 434 U.S. 497, 503 (1978).

The Fifth Circuit's decision ignores altogether—and, indeed, flips on its head—the "special weight" given to acquittals. In its *Ashe* analysis, the Fifth Circuit concluded that it was bound to "weigh mistried counts" in assessing the collateral-estoppel effect of an acquittal. Pet. App. 27a. It did so even though it is well established that a mistried count means *precisely nothing* for double-jeopardy purposes. Unlike an acquittal, which says something specific and concrete—namely, that the jury has unanimously concluded that the defendant is not guilty of the charged offense—a mistrial is a constitutional non-event. *See Richardson v. United States*, 468 U.S. 317, 325 (1984) (noting that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy" and that "the failure of the jury to reach a verdict is not an event which terminates jeopardy").

The Fifth Circuit's analysis wrongly "presumes that a mistried count, like an acquitted count, is a decision for which we can discern, or to which we can impute, a single

basis." *United States v. Ohayon*, 483 F.3d 1281, 1289 (11th Cir. 2007) (Pryor, J.). It is not. "[T]he failure of a jury to reach a verdict is not a decision; it is a failure to reach a decision." *Id.* Partial verdicts cannot be reconciled for the simple reason that "the mistried count is not a decision for which we can discern, or to which we can impute, a single, rational basis. The very essence of a mistried count is that the jury failed to reach agreement." *Id.*; *see also United States v. Romeo*, 114 F.3d 141, 144 (9th Cir. 1997) ("Because there are so many variable factors which can cause a jury not to reach a verdict, we will not speculate on why the jury could not agree. The inquiry under *Ashe* is what the jury actually decided when it reached its verdict, not ... why the jury could not agree on the deadlocked count.").

The upshot is that as between an acquittal and an inkblot (*i.e.*, the mistried count), the Fifth Circuit privileged the inkblot. That makes no sense. Because a mistried count is a double-jeopardy non-event, it cannot be "weighed" or otherwise used to devalue, let alone trump, a jury's conclusive judgment of acquittal. The Fifth Circuit's contrary conclusion cannot be reconciled with the acknowledged purpose of the Double Jeopardy Clause—and its component collateral-estoppel doctrine—to safeguard acquittals.

The perversity of the Fifth Circuit's approach is magnified once it is realized that the seemingly benign practice of "weighing" mistried counts against an acquittal to determine the acquittal's collateral-estoppel effect will, in actuality, result in a *per se* no-estoppel rule for partial verdicts. Indeed, while purporting to reserve judgment, the Government all but concedes that "the analysis adopted by the court of appeals will in practice

produce the same result as a categorical rule that collateral estoppel never applies in mixed verdict cases." Br. in Opp. 14 n.4. This *per se* no-estoppel rule results from the stringent showing that an acquitted defendant must make in order to avail himself of the collateral-estoppel doctrine—namely, that an issue of ultimate fact was *actually and necessarily decided* in his favor in the course of the earlier acquittal. If a mistried count on a charge with a factually overlapping element can be considered, or "weighed," in the collateral-estoppel calculus, then it will, by definition, create uncertainty regarding the jury's verdict of acquittal, thereby preventing the acquitted defendant from establishing what the jury necessarily decided when it acquitted him. Accordingly, *every* time a hung count is "weighed" in determining the collateral-estoppel consequences of a defendant's acquittal of a crime that shares one or more factually related elements, the hung count will act to preclude the defendant from getting the benefit of his acquittal.

That problem is exacerbated because a defendant has no practical way of peeking behind the jury's verdict to determine precisely why the jury acquitted him on one count while failing to reach a decision on another factually related count. The jury might have hung out of leniency, confusion, or even "exhaustion." *See* Yeager Br. 28. It will never be possible to know with any degree of certainty. *See Ohayon*, 483 F.3d at 1289 (recognizing that "the search for the basis of a mistried count will necessarily be in vain"). And even if a defendant could find out what caused the jury to hang, he couldn't make use of that information because litigants typically cannot introduce evidence concerning a jury's deliberations in order to discern what the verdict may or may not mean. *See* Fed. R. Evid. 606(b). Indeed, "[c]ourts have always

resisted inquiring into a jury's thought processes" on the ground that "this deference to the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *United States v. Powell*, 469 U.S. 57, 67 (1984). Without the practical ability to discover and use evidence necessary to understand definitively a jury's decision to acquit on one charge and to hang on another, a defendant's already-difficult burden under *Ashe* becomes insurmountable.

The Fifth Circuit's decision perfectly illustrates the point that "weighing" mistried counts will invariably lead to the unconstitutional disregard of a defendant's acquittal. In rejecting Yeager's collateral-estoppel argument, the court acknowledged that when "consider[ed] ... by themselves," Yeager's acquittals should "bar[] a retrial." Pet. App. 21a-22a. After "consider[ing] the hung counts along with the acquittals," however, the court unsurprisingly—indeed, inescapably—found "a potential inconsistency, making it impossible for [it] to decide with any certainty what the jury necessarily determined." *Id.* at 22a. Thus, the court said, collateral estoppel did not apply.

The decision below is squarely at odds with the Double Jeopardy Clause's core purpose of protecting acquittals. This Court should reverse the Fifth Circuit's decision, which cannot be reconciled with the constitutional principles espoused in *Ashe*, and make clear that mistried counts—double jeopardy non-events—cannot be used to undermine conclusive judgments of acquittal and their "special weight" under the Double Jeopardy Clause. *DiFrancesco*, 449 U.S. at 129; *Tibbs*, 457 U.S. at

41 (same); *accord Poland*, 476 U.S. at 156 ("'particular significance'" (quoting *Scott*, 437 U.S. at 91)).

B. The Fifth Circuit's Decision Will Encourage Overcharging And Facilitate Successive Prosecutions.

The Fifth Circuit's decision simultaneously undermines the Double Jeopardy Clause's second core function—the protection against successive prosecutions. The decision all but ensures that criminal defendants will increasingly face compound, multi-count indictments and (what is worse) exposes them to the very real possibility of successive prosecutions for factually related crimes arising out of the same underlying conduct. By creating a rule in which a hung count can trump a factually related acquitted count, the Fifth Circuit's decision perversely incentivizes prosecutors to charge as many overlapping counts as possible, thereby paving the way for a retrial. The reason is simple: Overcharging gives the government the best chance of evading the collateral-estoppel consequences of—in effect, insuring against—an acquittal. Where, as here, a jury acquits a defendant on one count but for some unknown (and unknowable) reason hangs on a count with a related element, the government is free, under the Fifth Circuit's rationale, to wipe the slate clean, retry the mistried count, and, for that matter, bring any other charge that otherwise would have been barred by *Ashe*. There is, from the prosecutor's perspective, absolutely nothing to lose by larding an indictment with overlapping charges and absolutely everything to gain.

This case is the perfect example. The Fifth Circuit correctly found that the jury "could have acquitted Yea-

ger on securities fraud only by concluding that he did *not* have insider information." Pet. App. 18a (emphasis added). The court of appeals further recognized that the jury's finding to that effect would appear to "preclude[] the Government from now prosecuting him on insider trading and money laundering"—both of which would require the Government to prove that, in fact, Yeager *did* have insider information. *Id.* at 21a. Thus, "consider[ing] the acquittals by themselves" leads inexorably to the conclusion that the jury unanimously found that the Government had failed to prove that Yeager possessed the very insider information that forms the basis of the insider-trading and money-laundering counts at issue in this successive prosecution. *Id.* at 21a-22a.

It is therefore common ground that if Yeager had been charged in his first trial with securities fraud *only*, the Double Jeopardy Clause (by way of collateral estoppel) would preclude the Government from now trying Yeager for insider trading and money laundering. *See Powell*, 469 U.S. at 64. But under the Fifth Circuit's rationale, everything changes—and the collateral-estoppel bar vanishes—simply because (1) the Government charged the insider-trading and money-laundering counts alongside securities fraud and (2) for whatever reason, the jury hung on the insider-trading and money-laundering counts. The inequity of that situation is patent, and the incentives it creates are perverse.

The Government does not deny that the Fifth Circuit's rule incentivizes prosecutors to overcharge their cases. *See* Br. in Opp. 16-17. Instead, the Government simply contends that "[t]he Double Jeopardy Clause is ... not designed to limit the number of charges that

prosecutors bring." *Id.* at 16. There are two problems with the Government's response.

First, the Government's seeming indifference to overcharging ignores the very real-life significance of the issue for defendants. Without question, "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous." Robert H. Jackson, *The Federal Prosecutor*, 31 J. Am. Inst. Crim. L. & Criminology 3, 3 (1940). And no decision a prosecutor makes is more significant than the decision whether—and how—to charge a defendant. Conviction or not, the "mere filing of a criminal charge can have a devastating effect upon an individual's life, including potential pretrial incarceration, loss of employment, embarrassment and loss of reputation, the financial cost of a criminal defense, and the emotional stress and anxiety incident to awaiting a final disposition of the charges." Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. Rev. 669, 672 (footnotes omitted).

When charging, prosecutors certainly (even if unintentionally) can cross the line between valid law enforcement and improper overreaching. "Charging decisions do not occur in a vacuum." *United States v. Thomas*, 961 F.2d 1110, 1123 (3d Cir. 1992). While "[g]overnment attorneys have extraordinary discretion in their charging decisions, ... they must exercise this discretion with one eye on promoting justice and one eye on winning their cases as efficiently as possible." *Id.* Indeed, the Government's own prosecutorial guidelines warn against the danger of overcharging: "It is important to the fair and efficient administration of justice in the Federal system that the government bring as few

charges as are necessary to ensure that justice is done." United States Department of Justice, *United States Attorneys' Manual* § 9-27.320(B) (2007). Significantly, the manual goes on to emphasize that "[t]he bringing of unnecessary charges not only complicates and prolongs trials, it constitutes an excessive—and potentially unfair—exercise of power." *Id.* By the Government's own admission, therefore, the fact that the Fifth Circuit's decision incentivizes overcharging is reason enough to worry that it undermines "the fair ... administration of justice." *Id.*[2]

Second, and more importantly, the issue is not, as the Government frames it, whether the Double Jeopardy Clause has anything to say regarding overcharging *per se*. Instead, the question is whether the Clause is implicated when the overcharging results in prosecutors having multiple opportunities to convict defendants. *See* Paula L. Hannaford-Agor, et al., *Are Hung Juries A Problem?*, The National Center for State Courts 84 (Sept. 30, 2002), *available at* http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf ("Prosecutors in criminal cases have the discretion to charge multiple defendants in one case and to decide how many counts the defendant will face. Our results indicate that these decisions by prosecutors affect whether a jury will hang."). The answer to that question is emphatically yes.

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[2] Here, the Government charged and tried 176 separate counts against five defendants. Yeager alone faced 127 counts. Significantly, the jury did not convict Yeager or his co-defendants of *any* of the 176 total counts that were tried. Instead, the jury acquitted on some counts and ultimately hung on a total of 140 other counts. *See* Yeager Br. 10.

There is no doubt that the Double Jeopardy Clause is designed to guard against successive prosecutions. *See Schiro*, 510 U.S. at 230. The Clause's history demonstrates that concerns about successive prosecutions, in turn, arose from the twin beliefs that final factual determinations should be respected and that prosecutors should not get multiple opportunities to convict. *See* Anne B. Poulin, *The Limits of Double Jeopardy: A Course Into The Dark?* 39 Vill. L. Rev. 627, 639 (1994) ("The original purpose of double jeopardy protection and its predecessors was to preserve the finality of judgments."); *id.* at 633-34 ("Double jeopardy protects the defendant's interest in freedom from multiple trials and multiple punishments ....").

The Government acknowledges this essential protection but asserts that Yeager's retrial on mistried counts is not a "successive" prosecution that implicates the Clause. *See* Br. in Opp. 16-17. That assertion should be rejected. Again, the Government's view seems valid only when viewed through a single lens. The argument unravels once both eyes are opened and Yeager's acquittals on factually overlapping charges come into full view. At the risk of repetition, those acquittals, when "consider[ed] ... by themselves," demonstrate that collateral estoppel bars Yeager's retrial. Pet. App. 21a-22a. The Government's insistence that Yeager's retrial is nonetheless not "successive" simply underscores the point that the Fifth Circuit's rule renders Yeager's acquittals meaningless, thereby opening the door for the prosecution to get a second shot at proving precisely what it failed to prove the first time around. In other words, on the Fifth Circuit's view, the prosecution now gets to do what *Ashe* expressly prohibits.

Jettisoning collateral estoppel in partial-verdict cases, as the Fifth Circuit has done, therefore creates a gaping hole in the fundamental constitutional protections against successive prosecutions. *See Schiro*, 510 U.S. at 230. Because the Fifth Circuit's rule allows "a second jury to reconsider the very issue upon which the defendant has prevailed," it "implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause." *United States v. Mespoulede*, 597 F.2d 329, 337 (2d Cir. 1979). Casting aside this core protective function of the Clause, the Fifth Circuit has created a system with little to "prevent[] the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction." *Tibbs*, 457 U.S. at 41. This greatly increases the risk of "[r]epeated prosecutorial sallies [that] unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance." *Id.*[3]

The practical threat posed by the Fifth Circuit's decision is very real. Legislatures are creating new—and often complex—criminal offenses every day. The federal criminal law, in particular, continues to experience ex-

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[3] There can be little doubt that the Government sought to "hon[e] its trial strategies" and "perfect[] its evidence" here when, in the wake of the jury's partial verdict, it re-indicted Yeager on some of the same insider-trading and money-laundering charges he had faced at trial. *Tibbs*, 457 U.S. at 41. As Yeager's brief explains, in the Eighth Superseding Indictment, the Government "did not simply delete the acquitted counts of the Fifth Superseding Indictment and rely on the hung counts"; rather, the Government "reworked and refined its theory of the case" in what was an "obvious response to the acquittals of Yeager on the fraud counts." Yeager Br. 11.

plosive growth. *See* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Legal Memorandum 26 (June 16, 2008), *available at* http://www.heritage.org/research/legalissues/lm26.cfm (cataloguing approximately 4,450 federal crimes and noting that Congress continues to adopt new crimes at a rate of about 57 per year); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 Am. U. L. Rev. 747, 755 (2004) ("[B]etween 1980 and 2003 the number of cases and defendants in the federal system ... more than doubled, with the number of criminal cases increasing 240% and the number of criminal defendants increasing 230%."). This continuing proliferation of criminal statutes permits prosecutors to "spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Ashe*, 397 U.S. at 446 n.10; *accord, e.g.*, *United States v. Bailin*, 977 F.2d 270, 277 (7th Cir. 1992). Unsurprisingly—and this is the kicker—juries hang more frequently in cases involving numerous and complicated counts. *See* Paula L. Hannaford-Agor, et al., *supra*, at 42, 45 (concluding that "[l]ooking at the cases that hang *on any charge*, the greater the number of charges, the more likely that one will be a hung jury outcome," and that "[j]uries in cases that hang on at least one charge rate the case as more complex and difficult for the jury to understand than verdict juries").

Prosecutors therefore clearly have the *opportunity* to skirt double-jeopardy protections by filing bloated multi-count indictments. And the Fifth Circuit's stingy view of collateral estoppel gives prosecutors the *incentive* to do just that. It leads to precisely the sort of agglomeration of prosecutorial power that prompted this Court in *Ashe* to reiterate the centrality of collateral es-

toppel to double-jeopardy doctrine. *See Ashe*, 397 U.S. at 446 n.10.

The Fifth Circuit's decision in this case discards core protections for acquitted defendants in exchange for a system that rewards prosecutors for overcharging their cases and then failing to prove the superfluous charges. This Court should step in to ensure that double-jeopardy principles are not so easily evaded.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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January 19, 2009

AMICUS CURIAE BRIEF

B609 120

(7)

No. 08-067

Supreme Court, U.S.
FILED
JAN 2 1 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

F. SCOTT YEAGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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AMICUS BRIEF IN SUPPORT OF PETITIONER IN *YEAGER V. UNITED STATES OF AMERICA*

INTERESTS OF THE AMICI

The Texas Criminal Defense Lawyers Association (TCDLA) is a Texas, non-profit corporation with a membership of more than 2900 attorneys practicing in the State of Texas. TCDLA was organized more than 37 years ago with the following purposes: (1) to protect and ensure by rule of law those individual rights guaranteed by the Texas and United States Constitutions in criminal cases, (2) to resist efforts to curtail such rights, (3) to encourage cooperation among lawyers engaged in the defense of citizens accused of crimes through educational programs and other assistance, and (4) through such cooperation, education, and assistance to promote justice and the common good.

Rex Shelby was Petitioner F. Scott Yeager's co-defendant at trial. This Court denied his petition for writ of certiorari in a companion case. While he is not a party to this proceeding he has a keen interest in its outcome as any modification of the law of collateral estoppel will be applicable to his case going forward under the Fifth Circuit's law of the case doctrine. Shelby was previously set for re-trial on February 2, 2009, but the district court has since abated the proceeding pending the outcome of this appeal.

Amici TCDLA and Shelby believe that the question presented as granted naturally encompasses the legal issues argued herein, namely the exact bounds of the collateral estoppel test articulated by this Court in *Ashe v. Swenson*, 397 U.S. 436 (1970).

Both Petitioner F. Scott Yeager and the government have given written consent to the filing of this brief.

SUMMARY OF THE ARGUMENT

This Court recognized collateral estoppel in federal criminal trials as part of the protection against multiple prosecutions nearly a century ago in *United States v. Oppenheimer*, 242 U.S. 85 (1916). While *Oppenheimer* confirmed that an issue of ultimate fact, once decided, cannot be relitigated at the defendant's peril, it made no effort to articulate a collateral estoppel standard. The Court's subsequent application of collateral estoppel in a criminal case, *Ashe v. Swenson*, while setting forth broad standards, did little to elucidate the application of those standards to determining the effect of prior verdicts, beyond eschewing an overly technical view of the record that could effectively deprive an acquittal of its constitutional effect. The growing uncertainty about the application of the *Ashe* test is reflected in the conflict among the lower courts and the Fifth Circuit's candidly open struggle with the standard during argument in this case.

This case thus presents the Court with a critical opportunity to articulate a standard by which prior judgments of acquittal are evaluated and to secure substance to the guarantee against Double Jeopardy. The Amici agree with Petitioner Yeager that unanswered counts should not be included in the collateral estoppel analysis. They also agree that a straightforward application of *Ashe* would require reversal as to Yeager. Beyond this, the Amici respectfully suggest that the Court should consider

the extent and distribution of the burden, bearing in mind that some level of uncertainty is unavoidable in examining a general verdict.

The formulation adopted in the Fifth Circuit in this case assigns too heavy a burden to the defendant. In particular, the Fifth Circuit wrongly required the Defendants to account for the jury's failure to arrive at verdicts on the counts sought to be barred and to do so in the face of a peculiar presumption of jury rationality that would have required the jury to acquit on all counts in the first place. An equally troublesome part of the Fifth Circuit's decision below is the consideration of inferences the jury is not asked to make at a particular trial or which may become increasingly unlikely or even absurd when viewed against the record as a whole. In so doing, the court left an uninterrupted series of acquittals as to three Defendants with no preclusive effect whatsoever. If jury indecision or freelancing is properly part of the collateral estoppel inquiry, the acquitted defendant should not have the burden of proving a negative by explaining indecision or overcoming presumptions as part of the analysis of what a jury necessarily decided. That result, driven by the Fifth Circuit's crabbed collateral estoppel standard, offends traditional notions of fair play and substantial justice. Indeed, the Fifth Circuit's standard creates an incentive, particularly strong in high-profile cases such as this, to over indict, leaving the risk of any uncertainty from an incomplete outcome or a worn-down or confused jury entirely to the defendant.

ARGUMENT

In the past several decades, Congress has vastly expanded the reach of the federal criminal code to address a broad variety of corporate and financial activities. More often than not, a single human undertaking alleged to constitute a crime will implicate several distinct prohibitions in Title 18. Prosecutors have essentially unlimited discretion in adding multiple overlapping counts, and the motivation for doing so is particularly acute in major white-collar prosecutions such as this one.

Recognizing the proliferation of offenses for "substantially identical offense conduct," the United States Sentencing Guidelines, for example, treat multiple statutory offenses like the single factual offense they really are by calling for concurrent punishment in order to "limit the significance of charging decisions." U.S.S.G. § 3D1.1. In addition, the Sentencing Guidelines determine offense levels based on what is found to be the total offense conduct by means of considering all relevant conduct and by aggregating all loss resulting from the total offense conduct. U.S.S.G. §§ 1B1.3, 2B1.1.

This Court's decisions in *Oppenheimer* and *Ashe* make clear that the government may not structure seriatim litigation in order to test critically disputed fact issues in one proceeding by simply withholding indictments or counts on one or more other overlapping theories of criminal culpability and reserving the remainder for a second trial. The immediate problem is whether the prosecution may accomplish the same purpose by presenting voluminous overlapping or potentially overlapping

counts in the same case, reserving the right to proceed anew where, by virtue of exhaustion, confusion or some other indiscernible reason, a jury acquits only in part. Under the Fifth Circuit's decisions the government can effectively over-charge a defendant out of his Fifth Amendment collateral estoppel protection.

I. THE FIFTH CIRCUIT'S COLLATERAL ESTOPPEL TEST IS ILLOGICAL, IMPRACTICAL, AND INADEQUATE TO PROTECT THE LIBERTY INTERESTS OF THE ACCUSED.

In assigning the risks of uncertainty between the state and the defendant, the Fifth Circuit erred in two ways. First, it erred in including in the defendant's burden of establishing what the jury necessarily decided an obligation to explain the jury's failure to give answers. Second, by forcing an impractical, unrealistic presumption of rationality on the jury's verdict — including the failure to arrive at a complete verdict and consideration of issues not contested at trial — the Fifth Circuit precluded any possibility of repose and robbed the acquittals of any constitutional significance.

As suggested by *Ashe*, the Fifth Circuit put the burden on the Defendants in this case to show what the jury necessarily decided when it acquitted them on a host of charges. Pet. App. 28a, *United States v. Yeager*, 521 F.3d 367, 371 (5th Cir. 2008). *Ashe* called broadly for a review of the entire case with an eye toward both "realism and rationality" and cautioned that any overly restrictive formulation would risk denying practical effect to the Double

Jeopardy Clause. *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). The Fifth Circuit has structured a test certain to deny any preclusive effect to those acquittals, despite *Ashe's* warning that any "technically restrictive test" would simply result "in a rejection of collateral estoppel in criminal proceedings." *Id.* at 444.

While *Ashe* called for courts confronting a past acquittal to take a practical view of the issues it resolved, it offered no detailed guidance with respect to how a court should go about the often difficult task of assessing what the jury decided. This Court has acknowledged that the lower courts have placed the burden on the Defendant to demonstrate what issue was actually decided. *Dowling v. United States*, 493 U.S. 342, 350-51 (1990). But it has never examined the wisdom of the lower courts' practice or the extent of that burden, namely whether it should be as absolute as practiced by the Fifth Circuit.

Rather than simply putting the Defendants to the burden of showing which of the elements in the acquitted charges were uncontested for practical purposes and focusing on the actively contested facts and inferences as they were presented to the jury, the Fifth Circuit's formulation went too far. It required the Defendants to explain why the jury had not arrived at a decision on the remaining counts and, in doing so, to overcome a presumption of rationality applicable both to the actual findings and the failure to arrive at verdicts. The impossible combination operated like a thumb on the scales, rejecting as irrational any factual determination that would be in common among the decided and undecided counts. Thus, as predicted by *Ashe*, the Fifth Circuit

effectively foreclosed the prospect of preclusion regardless of the actual probability that the jury decided a particular issue of fact. In essence, the Fifth Circuit's drive for its version of rationality blinded it to *Ashe's* overarching call for realism and practicality.

A. Compelling the acquitted defendant to justify the rationality of a jury's failure to arrive at a verdict as a condition of preclusion on those same counts is illogical.

As Petitioner Yeager details, the founders were well-aware of the considerable mental, emotional, and financial ordeal suffered by the accused defending his liberty though trial. Thus, a verdict of acquittal has substantial, fundamental constitutional significance under the Double Jeopardy Clause. And yet, by imposing a logically impenetrable fortress around the very counts at issue, the Fifth Circuit has deprived acquittals in a partial verdict case of any conceivable preclusive effect.

Where, as here, the jury has been discharged after giving only a partial verdict, the question of what facts it decided is dispositive of the broader — and constitutionally critical question — of whether the defendant can be forced to run the gauntlet a second time. By looking to the unanswered counts and presuming that the jury would have acquitted had it decided any fact in common with the actual verdict, the defendant's effort to establish any preclusive effect becomes impossible. Regardless of how narrow the *genuine* fact dispute at trial, any conclusion that the jury decided something in common between the acquitted and hung counts conflicts with the court's

formulation of a "presumption of rationality" and must be presumptively dismissed on that basis. Moreover, by placing the burden of disproving increasingly ungrounded speculation on the defendant, the test becomes practically impossible, as he or she is forced to disprove a series of increasingly improbable negatives, i.e., to prove that the jury did not decide on some basis that is not apparent from the record. While, on the facts of the record below, the jury's verdict was quite consistent, albeit incomplete, that consistency among answered counts supports a finding of rationality when discerned pursuant to the full framework of *Ashe*.

B. Forcing the acquitted defendant to overcome a myopic presumption of rationality as part of the burden of establishing what a jury necessarily decided is also contrary to practice and experience.

While it may be that a perfectly rational jury that decided a common factual issue in a defendant's favor would acquit on all counts every time, the *Ashe* test is more thoughtful. It adds realism and practicality to the rationality presumed on the part of a jury. The Fifth Circuit presumed, as the First and D.C. Circuits have, that if the jury would have found a common issue in the Defendants' favor, it would have acquitted on all counts. A blindly rational analysis might come to that conclusion, but in addition to rationality, *Ashe* requires realism, practicality, and an analysis firmly grounded in the record of a particular trial.

The analysis in the Fifth Circuit and in other cases in the lower courts is reminiscent of Alice's argument with the Red Queen: no matter what Alice's answer, the Red Queen simply changes the question or redefines the pertinent terms until Alice is left with "a riddle with no answer."[1] The sparse words of guidance in *Ashe* — realism, rationality, practicality — are made to mean too many different things leading to sporadic and absurd results.

In civil cases, this Court has long recognized that juries do not always act in predictable ways. While the Court adheres to the presumption that a jury has followed instructions when confronting efforts to set aside their verdict, it has taken a more realistic approach where multiple trials before different juries are concerned, acknowledging that juries do not always act in purely rational ways. Where a jury has decided a case in full, the Court has been careful to prevent a second trial on only part of the issues unless they are clearly distinct and separable. *Gasoline Prods. v. Champlin Refining*, 283 U.S. 494 (1931). For example, a jury's decisions on liability and damages are distinctly guided by instructions; but no one would deny that jurors do, as a practical matter, nonetheless carry and express a relevant sense of outrage at the Defendant or, conversely, a sense of compassion in having decided a close case on the merits to their damage calculations. *E.g., Great*

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[1] *See* LEWIS CARROLL, THROUGH THE LOOKING GLASS, ch. 9, The Millennium Fulcrum Edition 1.7, *available at*, http://www.gutenberg.org/files/12/12-h/12-h.htm.

Coastal Exp. v. Int'l B'hood of Teamsters, 511 F.2d 839 (4th Cir. 1975) (recognizing prospect of jury compromise); *Simo v. Mitsubishi Motors*, 245 Fed. App'x 245 (4th Cir. 2007) (refusing to permit retrial on punitive damages alone).

Likewise, the Court has acknowledged the practical reality that juries in criminal trials will give voice to "residual doubt" of guilt in their sentencing decisions, though the defendant is obviously not entitled to an instruction to encourage this. *Franklin v. Lynaugh*, 487 U.S. 164 (1988). If jury behavior always confined itself predictably to instructions, courts would not have found the need to establish a rule forbidding admission of proof of the actual deliberation process, even where it would prove misconduct, confusion or compromise. FED. R. EVID. 606(b), Adv. Comm. note; *but see Maddox v. United States*, 146 U.S. 140 (1892) (noted in advisory committee notes as exception to the general rule of inadmissibility).

As noted by Petitioner Yeager, here the most probable reason for a partial verdict, given the long trial, lengthy deliberations, and time-limited *Allen* charge, is that the jury simply got tired and rendered a "five o'clock verdict" so they could go home. Viewed with practicality and realism that is the most rational explanation for the seemingly random incomplete verdict. And yet, the Fifth Circuit's test dismisses this key record fact out of hand and denies relief on the presumption that some other reason explains the result.

Where a jury's verdict results in uncertainty in a criminal proceeding with its attendant heightened

safeguards aimed at preserving the defendant's liberty interests, leaving the defendant's Double Jeopardy rights at the mercy of a fiction and assigning all of the risks of that uncertainty to the accused is profoundly unfair, contrary to the clear directives in *Ashe* that courts should avoid any overly "technical" view, and contrary to the fundamental purpose of the Double Jeopardy Clause — to protect the accused from suffering the risks and tribulations of a subsequent prosecution.

II. THE BURDEN ON THE DEFENDANT SHOULD BE PRACTICALLY FOCUSED ON THE ISSUES ACTUALLY CONTESTED BEFORE THE JURY.

A. Ashe's call for a realistic approach was well founded and should direct the inquiry to the actual verdict and the genuinely disputed fact questions.

To be sure, a detailed imagining of possibilities in even the simplest trial can lead to endless speculation about what arguments or testimony a jury might have believed or disbelieved or, for that matter, what inferences it might have conjured on its own. But any fair-minded and logical attempt to resolve what a jury *actually* decided for purposes of preserving the right against double jeopardy will focus, like the civil summary judgment standard would, on the genuinely disputed material facts at trial. *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 1776 (2007) (the non-movant must show more than "some metaphysical doubt"). That, however, is not where the Fifth Circuit's test starts or ends. Rather, driven by its peculiar presumption of rationality, the

Fifth Circuit would require an acquitted defendant to affirmatively reach out to address and disprove increasingly improbable negatives, speculating first about what jurors might have concluded on their own, in spite of the actual contested dispute that played out before them, and then disproving the speculative scenario. The Fifth Circuit's position requires a defendant to repeatedly set up and then knock down a series of shifting straw men.

As detailed in the Petitioner's brief, a majority of the lower courts to confront the collateral estoppel question in the context of a partial verdict have concluded that a jury's failure to decide is not properly included in the process of determining what the jury actually decided. Br. for Pet. at 41-43. As the Seventh Circuit observed, "[t]he powerful double jeopardy protections that attach to acquitted counts should not be outweighed by the inconclusiveness inherent in hung counts." *United States v. Bailin*, 977 F.2d 270, 280 (7th Cir. 1992).

Because a jury's failure to decide can result from any of a number of factors, including simple exhaustion or confusion, and not all of which would be accounted for in the Fifth Circuit's presumption of rationality, including that speculation into the defendant's burden is fundamentally unfair. And, while the Amici agree with the Petitioner and the majority of the circuits that unanswered counts should be excluded from the analysis, regardless of how the Court decides to dispose of those counts, it should care to ensure that the process of reconciling the verdict remains "realistic" and "practical." As detailed below, the burden on the defendant should not be constructed as to preclude relief or to assign

all of the risk of uncertainty entirely to him, when the purpose of the Double Jeopardy Clause is to protect the accused from the realistic and practical effects of a subsequent prosecution.

B. Any speculation beyond the actively contested issues should not be part of the defendant's burden and should be sufficiently grounded so as to not strip the Double Jeopardy Clause of meaningful effect.

Partial verdicts and jury exhaustion are unavoidable realities. But constructing a test for examining the effect of an acquittal that leaves the defendant operating against a presumption that the jury would have acquitted in full had it remained to the end denies the Double Jeopardy Clause of any meaningful effect. Even without the difficulties presented by a partial verdict, such a test leaves the defendant struggling to explain away a series of improbable rationalizations for the actual verdict. This is precisely what the Court warned against in *Ashe* when it noted, albeit somewhat vaguely, that the "inquiry 'must be set in a practical frame, and viewed with an eye to all the circumstances of the proceedings.'" *Ashe*, 397 U.S. at 444 (quoting *Sealfon v. United States*, 332 U.S. 575 (1948)). Indeed, it seemed to predict the consequences of a standard like the one adopted by the Fifth Circuit here: "Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Id.*

This Court should clarify the scope of what should be considered to determine what ultimate facts a jury decided, that is, what is included in the forensic analysis of the original verdict. The arguments and inferences urged at trial are obviously key to any analysis of what a jury necessarily decided. Likewise, the existence of agreed or effectively uncontested facts focuses the analysis on the ultimate factual issues the jury had to weigh in order to reach its verdict. At a minimum, the government should bear the burden of proving that its theory of indecision is at least more likely than the defendant's proposed theory that the jury decided the verdict on some factual basis that would constitutionally prohibit a retrial. However the Court determines the framework of *Ashe v. Swenson* should be applied, the Court should confront the risks of speculation and confirm what level of certainty is to be required before a subsequent trial can be permitted consistent with the guarantee against Double Jeopardy .

If the Court decides to include in the analysis speculation beyond the actual verdict and genuinely disputed issues of material fact, the Court should insist that *probability* enter the analysis. While the mere theoretical possibility that a jury decided a fact that favors the defendant is insufficient under *Ashe*, where the defendant makes an affirmative showing that would rule out those ultimate issues of fact not genuinely disputed at trial, the inquiry should move forward. Where the defendant goes further and identifies the issues actively contested at trial and establishes that the jury's verdict necessarily resolved a material fact in common in both an acquitted and unanswered count, the burden should

shift to the government to show the defendant's contentions are probably incorrect based on the record of that particular trial. Once the defendant's prima facie case has been made, the prospect that the jury was acting on some *sub rosa* distinctions or drew some un-urged inference of its own may remain within the realm of conceivable possibility, but this possibility is not a basis for denying the judgment of acquittal any operative effect. Instead, the Court should require the government to show why a newly conjured rationale is in fact more likely than the defendant's theory to explain the cause for the jury's verdict. The government's showing should be based on a realistic and practical review of the record and not on speculation as to what the jury might have done. Or, if the Court leaves the burden with the defendant, the analysis should allow the benefit of estoppel where the defendant can demonstrate that the government's speculation is improbable based on the record of the particular trial.

Reasons can always be imagined if the weighing of a rational jury's decision is unmoored from the record of a particular trial. When the theory of the case is urged in opening and closing arguments, with dueling evidence on contested issues in between, the greatest probability is that the jury's acquittal was based on one of the hotly disputed issues, not a new theory proffered by the government in post-verdict briefing. If Double Jeopardy's collateral estoppel protections are to have any meaning, the defendant should have the benefit of that probability and not be forced to explain away even the most unlikely of possible explanations for the jury's verdict.

CONCLUSION

For the foregoing reasons, Amici urge the Court to reverse the judgment of the Fifth Circuit in this matter and fully articulate a workable, practical test that preserves the protections of collateral estoppel for criminal defendants.

Respectfully submitted,

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January 20, 2009